(13)

No. 05-1575 *** CAPITAL CASE ***

Title: Dora B. Schriro, Director, Arizona Department of Corrections, Petitioner

v.

Jeffrey Timothy Landrigan, aka Billy Patrick Wayne Hill

Docketed: June 9, 2006

Lower Ct: United States Court of Appeals for the Ninth Circuit

Case Nos.: (00-99011)

Decision Date: March 8, 2006

Questions Presented

Date	Proceedings and Orders
Jun 6 2006	Petition for a writ of certiorari filed. (Response due July 10, 2006)
Jul 3 2006	Order extending time to file response to petition to and including August 9, 2006.
Aug 9 2006	Brief of respondent Jeffrey Timothy Landrigan, aka Billy Patrick Wayne Hill in opposition filed.
Aug 23 2006	DISTRIBUTED for Conference of September 25, 2006.
Aug 30 2006	Reply of petitioner Dora B. Schriro, Arizona Department of Corrections filed. (Distributed)
Sep 26 2006	Petition GRANTED.
Oct 11 2006	Motion for leave to proceed in forma pauperis filed by respondent Jeffrey Timothy Landrigan, aka Billy Patrick Wayne Hill.
Oct 18 2006	Motion DISTRIBUTED for Conference of November 3, 2006.
Oct 31 2006	SET FOR ARGUMENT Tuesday, January 9, 2007.
Nov 6 2006	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Nov 13 2006	Joint appendix filed.
Nov 13 2006	Brief amici curiae of California and 26 Other States filed.
Nov 13 2006	Brief of petitioner Dora B. Schriro, Arizona Department of Corrections filed.
Nov 13 2006	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Nov 29 2006	CIRCULATED.
Dec 1 2006	Record received from U.S.C.A. for 9th Circuit. (1 envelope).
Dec 12 2006	Record received from U.S.D.C. for the District of Arizona (Phoenix). (2 boxes and 1 large and long container)
Dec 18 2006	Brief of respondent Jeffrey Timothy Landrigan, aka Billy Patrick Wayne Hill filed. (Distributed)
Dec 18 2006	Brief amicus curiae of National Association of Criminal Defense Lawyers

	filed. (Distributed)
Dec 18 2006	Brief amicus curiae of American Bar Association filed. (Distributed)
Jan 2 2007	Reply of petitioner Dora B. Schriro, Arizona Department of Corrections filed. (Distributed)
Jan 9 2007	Argued. For petitioner: Kent E. Cattani, Assistant Attorney General, Phoenix, Ariz. For respondent: Donald B. Verrilli, Jr., Washington, D.C.

Supreme Court, U.S.
FILED
JUN 6 - 2006
OFFICE OF THE CLERK

No. 05-1575

IN THE
SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

VS.

JEFFREY TIMOTHY LANDRIGAN, a.k.a.
BILLY PATRICK WAYNE HILL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Respondent Jeffrey Landrigan actively thwarted his attorney's efforts to develop and present mitigation evidence in his capital sentencing proceeding. Landrigan told the trial judge that he did not want his attorney to present any mitigation evidence, including proposed testimony from witnesses whom his attorney had subpoenaed to testify. On post-conviction review, the state court rejected as frivolous an ineffective assistance of counsel claim in which Landrigan asserted that if counsel had raised the issue of Landrigan's alleged genetic predisposition to violence, he would have cooperated in presenting that type of mitigating evidence.

1. In light of the highly deferential standard of review required in this case pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), did the Ninth Circuit err by holding that the state court unreasonably determined the facts when it found that Landrigan "instructed his attorney not to present any mitigating evidence at the sentencing hearing"?

2. Did the Ninth Circuit err by finding that the state court's analysis of Landrigan's ineffective assistance of counsel claim was objectively unreasonable under *Strickland v. Washington*, 466 U.S. 668 (1984), notwithstanding the absence of any contrary authority from this Court in cases in which (a) the defendant waives presentation of mitigation and impedes counsels attempts to do so, or (b) the evidence the defendant subsequently claims should have been presented is not mitigating?

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OPINION BELOW

An *en banc* panel of the United States Court of Appeals for the Ninth Circuit held that Landrigan has established a colorable claim of ineffective assistance of counsel entitling him to an evidentiary hearing in district court. *Landrigan v. Schriro*, 441 F.3d 638 (9th Cir. 2006) (Appendix A). *The en banc* ruling reversed a unanimous three-judge Ninth Circuit panel decision that had upheld the district court's judgment denying federal habeas relief. *See Landrigan v. Stewart*, 272 F.3d 1221 (9th Cir. 2001) (panel decision) (Appendix B); *Landrigan v. Stewart*, No. Civ 96-002367-PHX-ROS (D. Ariz. Dec. 15, 1999) (Appendix C). *See also State v. Landrigan*, 859 P.2d 111 (Ariz. 1993).

STATEMENT OF JURISDICTION

The Ninth Circuit filed its decision on March 8, 2006. This petition for writ of certiorari is timely filed within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of Counsel for his defence.

STATEMENT OF THE CASE

Respondent Jeffrey Landrigan is on death row in Arizona for a first-degree murder he committed in December of 1989. *See Landrigan*, 859 P.2d at114.

In November of 1989, Landrigan escaped from an Oklahoma Department of Corrections Facility, where he was serving prison terms for a 1982 murder and a 1996 prison stabbing. *Id.*

Soon thereafter, Landrigan arrived in Phoenix, Arizona, where he met the murder victim, a homosexual man who often tried to pick up other men by showing them money. On December 13, 1989, Landrigan went to the victim's apartment, where the two of them drank beer and socialized. The victim, who had picked up his paycheck earlier that day, called a friend to invite him to come over to "party" with "Jeff." *Id.* at 113. The victim called his friend a second time to describe sexual activities he said he was engaging in with Landrigan, and he called a third time to have his friend talk to Landrigan about a possible job. *Id.*

At some point after the phone conversations, Landrigan stabbed the victim and strangled him to death with an electrical cord. Landrigan left the victim's body face down on the bed, with a pool of blood by his head and facial lacerations and puncture wounds on his body. An ace of hearts, from a deck of cards depicting naked men in sexual poses, was carefully propped up on the victim's back, and the rest of the deck was strewn across the bed. The apartment had been ransacked, and the victim's paycheck was missing. *Id.*

When Landrigan was questioned, he denied knowing the victim or having ever been in his apartment. However, he was wearing the victim's shirt when he was arrested, and seven fingerprints taken from the victim's apartment matched Landrigan's. A shoe impression found in spilled sugar at the apartment matched Landrigan's tennis shoes, and blood on Landrigan's shoe matched blood on the victim's shirt. *Id.*

Landrigan had three telephone conversations with his ex-girlfriend in December of 1989. During one of those conversations, Landrigan told her that he was "getting along" in Phoenix by "robbing." Landrigan placed the last call from jail sometime around Christmas and told his ex-girlfriend he had "killed a guy . . . with his hands" about a week earlier. *Id.* at 113-14.

After Landrigan was convicted of murder, burglary and theft, the trial court considered evidence of aggravating and mitigating circumstances. The State established two statutory aggravating circumstances: (1) Landrigan was previously convicted of a felony

involving the use or threat of violence; and (2) the offense was committed for pecuniary gain. *Id.* at 114. Defense counsel presented a sentencing memorandum detailing evidence of Landrigan's long history of drug abuse as mitigation, but Landrigan impeded counsel's efforts to develop other mitigating evidence. (Appendix D, R.T. Oct. 25, 1990, at 7-22.)

Landrigan's counsel subpoenaed two of Landrigan's family members (his mother and his ex-wife) to testify at the sentencing hearing. However, Landrigan instructed them not to cooperate or testify. When counsel attempted to put on the record the type of evidence he had planned to present, Landrigan repeatedly interrupted and undermined every attempt by counsel to portray Landrigan in a more favorable light. (*Id.*) The Ninth Circuit panel decision aptly describes Landrigan's behavior at the sentencing hearing:

> Landrigan was not willing to merely express his opinions to counsel and, once having given those indications about his feelings, recede into comparative silence as counsel went about the business of conducting the proceeding. Quite the contrary; Landrigan took an actively aggressive posture, which ensured that counsel's attempts to place mitigating factors before the sentencing court would come a cropper. Each of counsel's feints in the mitigation direction brought a statement from Landrigan that painted an even bleaker picture and made matters even worse. But we will not merely resort to characterization; we will illustrate the situation with Landrigan's own words.
>
> In an attempt to soften the effect of the fact that Landrigan had previously murdered his best friend, Greg Brown, counsel said that as Landrigan was walking away, Brown, a much larger man, rushed up and attacked him. Landrigan, who happened to be carrying a knife, defended himself and unfortunately

killed Brown. A plausible story, but Landrigan would have none of it. His attorney got it all wrong. Rather, said he, "When we left the trailer, Greg went out of the trailer first. My wife was between us. I pulled my knife out, then I was the one who pushed her aside and jumped him and stabbed him. He didn't grab me. I stabbed him." In other words, Landrigan had come from behind and acted in a murderous way. That was all there was to it.

Landrigan behaved similarly when counsel tried to envelop the assault on another prison inmate in a brume of self defense by suggesting that Landrigan had been threatened by the victim, who was a friend of Greg Brown and Greg's father. Landrigan responded thusly: "That wasn't Greg Brown's dad's friend or nothing like that. It was a guy I got in an argument with. I stabbed him 14 times. It was lucky he lived. But two weeks later they found him hung in his cell." Again, Landrigan had unnecessarily behaved in an extremely violent and murderous way toward another human being.

And when counsel tried to burnish Landrigan's benighted past by indicating that before Brown's murder, Landrigan, for at least one brief shining moment, was a "loving, caring husband," who had married and was taking care of his wife and her child by "working . . . at a golf course during the year-and-a-half" preceding the killing, Landrigan demurred. He explained: "Well, I wasn't just working. I was doing robberies supporting my family. We wasn't married. We wasn't married in Arizona. We lived in Oklahoma. I mean, you, he's not getting the story straight. Why have him tell somebody else's story in the first fucking place?"

If that were not enough, Landrigan made the following presentation when the court asked if he would like to say anything in his own behalf:

> Yeah. I'd like to point out a few things about how I feel about the way this shit, this whole scenario went down. I think that it's pretty fucking ridiculous to let a fagot be the one to determine my fate, about how they come across in his defense, about I was supposedly fucking this dude. This never happened. I think the whole thing stinks. I think if you want to give me the death penalty, just bring it right on. I'm ready for it.

(Appendix B, 272 F.3d at 1226-27.)

The trial court considered the information presented at the sentencing hearing, as well as defense counsel's sentencing memorandum, and the court found as mitigation that Landrigan loved his family and his family loved him, and that the jury did not find premeditation. The court found, however, that the mitigation was insufficient to warrant leniency and imposed a death sentence. The court stated:

> I find the nature of the murder in this case is really not out of the ordinary when one considers first degree murder, but I do find that Mr. Landrigan appears to be somewhat of an exceptional human being. It appears that Mr. Landrigan is a person who has no scruples and no regard for human life and human beings and the right to live and enjoy life to the best of their ability, whatever their chosen lifestyle might be. Mr. Landrigan appears to be an amoral person.

Landrigan, 859 P.2d at 117; (*see also* Appendix D, at 33.) The court also imposed a 20-year prison term for the burglary conviction and 6 months in jail for theft. (Appendix D, at 34.)

Landrigan appealed his convictions and sentences to the Arizona Supreme Court. The court denied the appeal and upheld Landrigan's death sentence after independently reviewing the aggravating and mitigating circumstances. *Landrigan*, 859 P.2d at 117; (*see also* Appendix D, at 22.)

In January of 1995, Landrigan filed a petition for post-conviction relief raising, among other claims, an argument that trial counsel was ineffective at sentencing for failing to present mitigating evidence. Landrigan submitted an affidavit stating that if his attorney had discussed with him the theory of a biological component to violence in his family, he would have allowed that type of evidence to be presented. His affidavit did not allege that he would have been willing to permit the presentation of any other type of evidence. (Appendix E, Affidavit dated January 24, 1995.)

The same judge who sentenced Landrigan considered and rejected the post-conviction claim, holding that it was both frivolous and precluded. (Appendix F, Order dated July 17, 1995, at 3-4.) The judge noted that Landrigan had expressly waived presentation of *any* mitigation, and that Landrigan's "statements at sentencing belie his new-found sense of cooperation." *Id.* The judge denied Landrigan's motion for rehearing, and the Arizona Supreme Court denied Landrigan's petition for review from that ruling.

In October of 1996, Landrigan filed a preliminary petition for writ of habeas corpus and application for appointment of counsel, and he filed an amended petition on July 31, 1997. The petition included a claim that counsel was ineffective at sentencing for not presenting evidence regarding a biological component underlying Landrigan's history of violence.

The federal district court rejected Landrigan's ineffective assistance of counsel claim and denied the petition. In rejecting the claim, the court bypassed the deficient performance prong of the *Strickland* analysis[1], and found that Landrigan "failed to demonstrate he was prejudiced by his trial counsel's alleged failure to discover and present mitigation evidence." (Appendix C, at 15-17.) The district court reviewed the mitigation Landrigan claimed should have been presented and concluded that Landrigan failed to demonstrate a reasonable probability that the result of the proceeding would have been different. (*Id.* at 16.) The district court rejected as unnecessary Landrigan's request for an evidentiary hearing and denied the petition. (*Id.* at 33-36.)

Landrigan appealed that ruling to the Ninth Circuit, and a unanimous three-judge panel upheld the district court. (Appendix B, 272 F.3d at 1231.) In upholding the denial of relief on Landrigan's ineffective assistance of counsel claim, the panel noted that, under *Strickland*, the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. (*Id.*, 272 F.3d at 1225-26.) The panel observed that, although there may be close cases in terms of the reasonableness of counsel's actions or inactions in light of the defendant's actions, this was not one of them:

> [O]ur ultimate decision will depend upon the facts and circumstances of the particular case before us. In the constellation of refusals to have mitigating evidence presented, however, this case is surely a bright star. No other case could illuminate the state of the client's mind and the nature of counsel's dilemma quite as brightly as

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[1] Under *Strickland*, a defendant who challenges his counsel's effectiveness at sentencing must demonstrate (1) deficient performance on the part of counsel, *and* (2) resulting prejudice, that is, a reasonable probability that absent counsel's errors, the sentencer would have imposed a different sentence. 466 U.S. at 687

> this one. No flashes of insight could be more fulgurous than those which this record supplies.

(*Id.*, 272 F.3d at 1226.) The panel thus concluded that Landrigan failed to establish a basis for relief:

> When Landrigan was facing the possibility that the death penalty would be imposed upon him for the murder of his victim, he prevented the placement of some mitigating evidence before the sentencing judge. In fact, when counsel attempted to cast Landrigan's past history in a somewhat better light, Landrigan was quick to demolish those attempts and make sure that the court saw his past as drear indeed. He left the Arizona courts with the thought that he was minatory and remorseless. *Landrigan I*, 176 Ariz. at 8, 869 P.2d at 118. He does say that he would have allowed the presentation of genetic predisposition evidence, but it is not reasonably probable that the outcome would have been affected by that evidence. Perhaps Landrigan now regrets his stance, but we do not sit to palliate regrets. We sit to determine whether there has been error of constitutional magnitude. There has not been.

(*Id.*, 272 F.3d at 1231-31.)

The Ninth Circuit agreed to consider the case *en banc*, however, and the panel decision was subsequently withdrawn. *Landrigan v. Stewart*, 397 F.3d 1235 (9th Cir. 2005). An *en banc* majority reversed, holding that Landrigan had alleged a colorable claim for relief, and was entitled to an evidentiary hearing regarding his claim of ineffective assistance of counsel at sentencing. (Appendix A, 441 F.3d at 649.) Two circuit judges dissented, finding that Landrigan failed to allege facts that, if proven, would demonstrate *Strickland* prejudice. The dissenters noted that even the majority opinion acknowledged that "all the mitigating circumstances Landrigan faults counsel for not raising 'converge' to support the suggestion that he suffers from antisocial

personality disorder and cannot control his actions." (*Id.*, 441 F.3d at 651.) The dissenters concluded that because Arizona courts have found that an antisocial personality disorder diagnosis is not compelling mitigation evidence, Landrigan had not alleged facts that if proven would create an objectively reasonable probability that he would have received a different sentence. (*Id.*, 441 F.3d at 651, 653.)

REASONS WHY THE WRIT SHOULD BE GRANTED

This case provides an extraordinary example of a failure to accord proper deference to factual findings and state court application of this Court's authority in cases decided under the AEDPA's amendments to 28 U.S.C. § 2254. This case also presents a question of great significance nationwide that has not been squarely addressed by this Court regarding the extent of defense counsel's obligation to develop and present mitigation when the defendant actively thwarts counsel's efforts to do so. There is a conflict between the federal circuits in how to address ineffective assistance of counsel claims in cases of this nature.

This Court should reverse the Ninth Circuit's ruling for at least two reasons. First, the Ninth Circuit failed to properly defer to the state court's factual finding that Landrigan "instructed his attorney not to present any evidence at the sentencing hearing." Second, the Ninth Circuit's conclusion that, by denying Landrigan's ineffective assistance of counsel claim, the state courts unreasonably applied this Court's precedent, is unsupportable. There are no cases from this Court that compel the conclusion reached by the Ninth Circuit, and the Ninth Circuit's analysis is in fact inconsistent with this Court's rulings in *Strickland* and *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), and conflicts with rulings from other circuit courts and state courts of last resort. Moreover, the ruling regarding the prejudice prong fails to properly defer under the AEDPA to what is essentially a factual finding by the state courts – in particular the ruling by the original sentencing judge that Landrigan's post-conviction claim was "frivolous."

I. *The Ninth Circuit Exceeded Its Authority Under The AEDPA When It Rejected The State Courts' Factual Finding That Landrigan Instructed His Defense Attorney Not To Present Any Mitigating Evidence.*

Under 28 U.S.C. § 2254(d), a federal habeas petitioner must demonstrate that the state court's adjudication of the merits resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts. *See Lockyer v. Andrade*, 538 U.S. 63, 70-73 (2003); *Bell v. Cone*, 535 U.S. 685, 693-95 (2002).

In the instant case, the Ninth Circuit ruled that the "state court's finding that [Landrigan] instructed his defense attorney not to present any mitigating evidence was an 'unreasonable determination of the facts.'" (Appendix A, 441 F.3d at 638, 647.) However, that ruling does not withstand scrutiny under any standard of review, much less under the highly deferential standard required by the AEDPA.

The state court record shows that at the sentencing hearing, the trial court engaged in the following colloquy with Landrigan:

> THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish for him to bring any mitigating circumstances to my attention?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Do you know what that means?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?

THE DEFENDANT: Not as far as I'm concerned.

(Appendix A, 441 F.3d at 646; (Appendix D, at 4.)) That colloquy clearly establishes a basis for the state courts' finding that "Landrigan instructed his defense attorney not to present any mitigating evidence."

The Ninth Circuit nevertheless posits that Landrigan's comments were taken out of context, and that the remainder of the transcript compels the conclusion that Landrigan was saying something other than that he wanted to waive presentation of any mitigation and may have wanted only to waive presentation of testimony from family members. (Appendix A, 441 F.3d at 646.) However, far from supporting the Ninth Circuit's conclusion, the context of Landrigan's statements confirms that Landrigan was not cooperating with counsel's attempt to develop mitigation and that he did not want *any* mitigating evidence to be presented.

Landrigan's counsel informed the trial court that he had intended to present as mitigation the testimony of Landrigan's natural mother, Landrigan's ex-wife, and psychiatric experts, but that Landrigan prevented his mother and ex-wife from testifying, and his mother's refusal to cooperate impeded counsel's efforts to present expert testimony:

> MR. FARRELL: Your Honor, at this time—I had, as the Court is aware, already filed a sentencing memorandum concerning a number of mitigating factors for the Court to consider concerning my client before sentencing. I have two witnesses that I wish to testify before this Court, one I had brought in from out of state and is my client's ex-wife, Ms. Sandy Landrigan. The second witness is my client's natural mother, Virginia Gipson. I believe both of those people had some important evidence that I believed the Court should take into mitigation concerning my client. However, Mr.

Landrigan has made it clear to me—Jeffrey, the defendant—that he does not wish anyone from his family to testify on his behalf today.

I have talked with Sandra Landrigan, his ex-wife. I have talked a number of times with her and confirmed what I thought was important evidence that she should present for the Court. And I have also talked with Ms. Gipson, and her evidence I think is very important and should have been brought to this Court's attention. Both of them, after talking with Jeff today, have agreed with their, in one case son and the other ex-husband, they will not testify in his behalf.

THE COURT: Why not?

MR. FARRELL: Basically it's at my client's wishes, Your Honor. I told him that in order to effectively represent him, especially concerning the fact that the state is seeking the death penalty, any and all mitigating factors, I was under a duty to disclose those factors to this Court for consideration regarding the sentencing. He is adamant he does not want any testimony from his family, specifically these two people that I have here, his mother, under subpoena, as well as having flown in his ex-wife.

I have advised him and I have advised him very strongly that I think it's very much against his interests to take that particular position. I have also advised both the witnesses I could have them sworn in and ask them questions, but they are under an obligation to do what they feel is right, Your Honor they are looking after Jeff's interest.

I'm coming from the position that I have to bring certain evidence before this Court. I'm at a loss. I don't know what this Court wishes to do.

THE COURT: Mr. Landrigan, *have you instructed your lawyer that you do not wish for him to bring any mitigating circumstances to my attention?*

THE DEFENDANT: *Yeah.*

THE COURT: Do you know what that means?

THE DEFENDANT: Yeah.

THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?

THE DEFENDANT: Not as far as I'm concerned.

THE COURT: I believe we should proceed if the witnesses are willing to testify.

MR. FARRELL: Your Honor, both witnesses have advised me they do not wish to and will not testify. If the court wishes, we can ask each of them.

(Appendix D, at 2-5, emphasis added.)

After both witnesses stated in court that they would honor Landrigan's wishes and refuse to testify, the trial court permitted defense counsel to explain what he believed their testimony would be and how it might relate to proposed expert testimony:

MR. FARRELL: Your honor, I have talked with Ms. Gipson a number of times and she advised me about the factors that I was going to ask her concerning my client would basically—since she didn't raise him, would be the fact during her pregnancy, what if any factors could possibly have affected her pregnancy. And she advises me that she and her husband, Jeffrey's natural father,

were both drug users prior to her pregnancy, she was a drug user during her pregnancy, and I believe she used drugs after her pregnancy. The times and the extent I was going to bring out today, because I believe that there is some evidence that has been presented to the Court in the past concerning the possible effect on an infant when the mother takes drugs and their particular susceptibility to drugs and their antisocial behavior resulting because of their dependency on drugs when they were–during the period of gestation when they were being carried in their mother's body.

And I wish to establish that as a mitigating factor, and if sufficient, *I was going to after getting that testimony, I was considering asking for a recess to determine if I could substantiate the testimony that I had here today from other experts that may be available.* It is a relatively new area that I am not really familiar with. I have talked with some attorneys in the Phoenix area as well as the Tucson area concerning this type of mitigation, concerning the effect on an unborn infant when their mother is dependent on drugs and the resulting effect on the infant, neurological effect as well as any antisocial behavior. I believe there are some qualified experts in the area. *Once I was able to ascertain what particular types of substances Ms. Gipson had been on, the duration, and getting some foundation, I would be able to have those particular experts come in and have the Court consider their testimony in that area.*

THE COURT: Were you going to call any psychological experts such as Dr. Tatro?

MR. FARRELL: That was one name that was brought up, Your Honor. There's also—I have been in contact with—I believe it's Arizona Capital Representation people and they have provided me with a number of other

experts. *But before I could talk with those experts about any specifics, I would have to find out what particular drugs might have been used and how long a period of time.*

THE COURT: Mr. Farrell, my question was not addressed to tying up Ms. Gipson's drug use during pregnancy to the defendant's current psychological condition. My question simply was would you consider — have you considered whether or not a psychological evaluation should be done on your client?

MR. FARRELL: I have considered it, yes.

THE COURT: All right, and have you had sufficient time to have such expert examine your client?

MR. FARRELL: Yes, I have, Your Honor.

THE COURT: And would you have a psychiatrist or psychologist standing in the wings to testify today?

MR. FARRELL: I could have, Your Honor.

THE COURT: Did you choose to, to present mitigating circumstances?

MR. FARRELL: Your Honor, at this time I do not have the information I thought necessary for those experts to testify based on the fact that Ms. Gipson had not presented any specifics for me. And I thought that was really—I understand there may be a problem and if she was not able to testify then I had no specifics for these people.

(Appendix D, at 12–16, emphasis added.)

Landrigan not only objected to testimony from his family members, he objected to counsel's attempt to convey information:

> THE DEFENDANT: Isn't this just hearsay, what is going on here? If I wanted this to be heard, I'd have my wife say it.

(Appendix D, at 7-8.) Thus, the Ninth Circuit's conclusion that Landrigan only objected to testimony from family members is clearly inaccurate; Landrigan's objection obviously applied as well to information presented by his attorney, who was not a member of Landrigan's family. Moreover, Landrigan, who was obviously capable of speaking for himself, did not interject at any point to say, "I only object to testimony from my family members. I do not object to testimony from an expert witness such as described by my attorney." Instead, he made clear he did not want *any* mitigation to be presented.

Furthermore, there is nothing in the record suggesting that the trial court would not have granted the "recess" counsel indicated he would seek if Landrigan agreed to cooperate in developing evidence for consideration by expert witnesses. The trial court evidenced an interest in obtaining as much information as could be made available, and the blame for limiting mitigation lies not with defense counsel or the trial court, but with Landrigan himself.

Finally, in Landrigan's post-conviction affidavit, he avowed only that he would have permitted testimony regarding a biological component to violence in his family. He made no such avowal as to any other type of expert testimony or any other type of mitigating evidence. Thus, the Ninth Circuit's conclusion that Landrigan's express statements to the court waived only testimony from two of his family members is unsupportable. Accordingly, the factual underpinnings of the Ninth Circuit's analysis ruling fails, and the Ninth Circuit exceeded its authority under the AEDPA by failing to defer to the state court's factual finding that Landrigan waived presentation of *any* mitigating evidence.

II. *The Ninth Circuit Exceeded Its Authority Under The AEDPA When It Found That The State Court's Ruling Was An Unreasonable Application of Clearly Established Federal Law.*

The Ninth Circuit erred by finding that the state courts unreasonably applied *Strickland* because there is no source in this Court's case law for the proposition that the defendant cannot waive the presentation of mitigating evidence. *See Kane v. Espitia*, 126 S. Ct. 407 (2005) (holding that under 28 U.S.C. § 2254(d)(1) clearly established federal law means case law from this Court). The state court's decision is in fact entirely consistent with case law from this Court addressing a defendant's right to waive mitigation and is consistent with this Court's jurisprudence regarding the prejudice prong of the *Strickland* analysis.

The same judge who sentenced Landrigan considered his post-conviction petition and applied *Strickland* in addressing Landrigan's ineffective assistance of counsel claim. (Appendix F, at 3-4.) In rejecting the claim as "frivolous," the court noted that "[s]ince defendant instructed his attorney not to present **any** evidence at the sentencing hearing, it is difficult to comprehend how defendant can claim counsel should have presented other evidence at sentencing." (*Id.* at 3, emphasis in original.) The court further noted that Landrigan's assertion in an affidavit that he would have permitted some type of mitigation to be presented was not credible and was belied by his statements at sentencing. (*Id.* at 4.)

In *Strickland*, this Court held that the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." 466 U.S. at 691. Counsel's conduct must be evaluated in light of "informed strategic choices made by the defendant and on information supplied by the defendant." *Id.*

In the present case, Landrigan's actions and strategic choices undermined counsel's concerted efforts to develop and present mitigation. Landrigan made clear he did not want *any* mitigation

presented. Landrigan not only failed to cooperate with counsel, he actively undermined counsel's attempts to develop and present mitigation. Thus, Landrigan cannot establish either deficient performance or resulting prejudice.

The Ninth Circuit *en banc* opinion cites *Williams v. Taylor*, 529 U.S. 362 (2000), *Rompilla v. Beard*, 125 S. Ct. 2456 (2005), and *Wiggins v. Smith*, 539 U.S. 510 (2003), in concluding that the state court opinion was contrary to or involved an unreasonable application of clearly established federal law. (Appendix A, 441 F.3d at 642-43.) However, *none* of those cases involve a situation in which the defendant affirmatively represented to the trial court that he did not want any mitigation to be presented and actively undermined any effort by counsel to present mitigation. Accordingly, the instant case cannot be said to be contrary to clearly established federal law.

The Constitution does not prohibit a defendant in a capital case from waiving presentation of mitigation evidence. *See Blystone*, 494 U.S. at 306 n.4 (affirming death sentence where "[a]fter receiving repeated warnings from the trial judge, and contrary advice from his counsel, petitioner decided not to present any . . . mitigating evidence."). Thus, the state court's ruling that Landrigan's express waiver of presentation of mitigation renders his ineffective assistance claim "frivolous" is consistent with federal law, as set forth in *Strickland* and *Blystone*. Accordingly, the state courts' denial of Landrigan's claim was not an unreasonable application of clearly established law from this Court.

The approach taken by the *en banc* court in this case conflicts with that in other circuits. For example, in *Wallace v. Ward*, 191 F.3d 1235 (10th Cir. 1999), the Tenth Circuit rejected a similar claim that counsel did not provide effective representation in a situation in which the defendant waived his right to present mitigation evidence. The Tenth Circuit noted that the defendant "refused to cooperate with his attorney in the presentation of mitigating evidence; indeed [the defendant] would not even let his attorney cross-examine prosecution witnesses during the sentencing hearing. In rejecting the defendant's

claim of ineffective assistance based on an allegation that counsel allegedly conducted no investigation, the Tenth Circuit quoted this Court's statement in *Strickland* that "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements and actions." 191 F.3d at 1247. The court concluded that counsel's decision not to investigate or present mitigating evidence was completely determined by the defendant and was within the realm of reasonable tactical decisions. *Id.* at 1248. The court further concluded that the defendant had not shown prejudice because he was actively seeking the death penalty. Thus, counsel's alleged deficiencies did not affect the sentence. *Id.*

In *Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir. 1985), the Eleventh Circuit similarly rejected a claim of ineffective assistance of counsel based on the defendant's conduct, holding that "[w]hen a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made."

The Ninth Circuit's ruling in the instant case cannot be squared with these decisions from the Tenth and Eleventh Circuits. This Court should grant certiorari review to settle this conflict.

Furthermore, the Ninth Circuit's ruling regarding prejudice fails to defer to what is essentially a factual finding by the state court. The state court found that Landrigan's assertion that his counsel was ineffective for failing to present evidence of a genetic predisposition to violence to be "frivolous." The judge considering this post-conviction claim was the same judge who sentenced Landrigan. Thus, there is no need to speculate about whether the information Landrigan claims should have been presented would have changed the outcome of his sentencing proceeding. The state court's ruling regarding the post-conviction claim is essentially a factual finding entitled to deference, particularly under the AEDPA standard of review.

Finally, even assuming the state court's ruling regarding whether Landrigan was prejudiced by counsel's alleged failure to present evidence of a predisposition to violence is not a factual finding,

and is instead strictly a legal conclusion, the state court's ruling was not objectively unreasonable because the evidence at issue would not have been presented because of Landrigan's unwillingness to present mitigation and because it is only marginally—if at all—mitigating.

The three-judge panel that upheld the district court ruling concluded that Landrigan's tenuous theory that his biological background made him what he is would not have affected the trial judge at sentencing:

> It is highly doubtful that the sentencing court would have been moved by information that Landrigan was a remorseless, violent killer because he was genetically programmed to be violent, as shown by the fact that he comes from a family of violent people, who are killers also.

(Appendix B, 272 F.3d at 1228-29.) The panel noted that this type of information would have shown the court that Landrigan would continue to be violent:

> He had already done that to a fare-thee-well. The prospect was chilling; before he was 30 years of age, Landrigan had murdered one man, repeatedly stabbed another one, escaped from prison, and within two months murdered still another man. As the Arizona Supreme Court so aptly put it when dealing with one of Landrigan's other claims, "[i]n his comments, defendant not only failed to show remorse or offer mitigating evidence, but he flaunted his menacing behavior." *Landrigan I*, 176 Ariz. at 8, 859 P.2d at 118. On this record, assuring the court that genetics made him the way he is could not have been very helpful. There was no prejudice.

(*Id.* at 1229).

The two circuit judges who dissented from the *en banc* ruling agreed with the panel and further noted that, under Arizona law, an antisocial personality disorder diagnosis "has often been treated on appeal as insufficient to justify mitigation," particularly when the defendant is able to control his conduct in other settings. (Appendix B, 441 F.3d at 651) (citing *State v. Brewer*, 826 P.2d 783, 802-03 (1992)). The two dissenting *en banc* judges observed that in the instant case, Landrigan was able to control his impulses long enough to cultivate the victim's trust and attempt to profit from their encounter. Thus, an anti-social personality disorder would not be mitigating in this case. *Id.*

The Arizona Supreme Court has repeatedly held that a personality disorder, standing alone, is not entitled to any mitigating weight. *See e.g. State v. Jones*, 4 P.3d 345, 367 (Ariz. 2000); *State v. Gerlaugh*, 698 P.2d 694, 704 (Ariz. 1985). Only if there is "some reason other than the nature of the disorder" will an antisocial personality disorder be entitled to any mitigating weight. *Gerlaugh*, 698 P.2d at 704. Evidence that Landrigan is a violent unrehabilitative sociopath was clearly established by Landrigan's criminal history and by his statements at the time of sentencing. Additional evidence to that effect would not have aided Landrigan's case, and he has not established even a remote possibility that this evidence would have changed the outcome of his sentencing proceeding. Thus, the state court's ruling denying Landrigan's claim was not unreasonable.

Failure to accord deference on federal review to state court rulings regarding the application of *Strickland* undermines the states' interest in the finality of their judgments in criminal cases. The Ninth Circuit's recent record in addressing *Strickland* claims demonstrates why public confidence in the criminal justice system is undermined when federal courts do not accord deference to state court rulings. Since 1998, the Ninth Circuit has granted habeas relief in six Arizona capital cases on the basis of ineffective assistance of counsel at sentencing. *See Lambright v. Stewart*, 241 F.3d 1201 (9th Cir. 2001) (remanded for evidentiary hearing); *Smith (Joe Clarence) v. Stewart*, 189 F.3d 1004 (9th Cir. 1999) (remanded for new sentencing); *Wallace v. Stewart*, 184 F.3d 112 (9th Cir. 1999) (remanded for new sentencing);

Smith (Bernard) v. Stewart, 140 F.3d 1263 (9th Cir. 1998) (remanded for new sentencing); *Correll v. Stewart*, 137 F.3d 1404 (9th Cir. 1998) (remanded for an evidentiary hearing); *Summerlin v. Schriro*, 427 F.3d 623 (2005) (remanded for new sentencing).

Proceedings subsequent to the Ninth Circuit's reversals in five of those cases have resulted in rulings upholding the death sentence following an evidentiary hearing or resentencings where death has again been imposed.[2] In the sixth case (Summerlin), the defendant is awaiting resentencing. Thus, the Ninth Circuit's reversals have served only to delay finality.

If left unchanged, the Ninth Circuit's ruling in this case will similarly delay finality and exact an unwarranted toll on victims and the criminal justice system. The Ninth Circuit's ruling should be reversed.

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[2] In August 2004, following an evidentiary hearing in district court, the court denied Lambright's ineffective assistance of sentencing counsel claim. (Dkt.325; https://ecf.azd.uscourts.gov/cgi-bin/DktRpt.pl?123647959341114-L_280_0-1). Lambright was originally sentenced to death in May 1982.

In June 2004, a jury re-imposed Joe Clarence Smith's two death sentences. http://www.superiorcourt.maricopa.gov/docket/criminal/caseInfo.asp (CR0000095116). Smith was originally sentenced to death in August 1977 for both murders, an 18-year old girl murdered in December 1975 and a 14-year-old girl murdered in January 1976.

In April 2005, a jury re-imposed Wallace's three death sentences. http://www.cosc.co.pima.az.us/courtpartners/start.asp. (CR-12590). Wallace was originally sentenced in May 1985, following his guilty plea to murdering two children and their mother.

In March 2003, following an evidentiary hearing, the district court denied Correll's ineffective assistance of sentencing counsel claim. (Dkt. 439; https://ecf.azd.uscourts.gov/cgi-bin/DktRpt.pl?111478375068962-L_280_0-1. Correll was originally sentenced to death for the triple murders in November 1984.

CONCLUSION

This case is an extreme example of the Ninth Circuit's failure to accord deference to factual findings by a state court. If the Ninth Circuit's ruling is not reversed, the deference standard required under the AEDPA is essentially meaningless. No amount of mental gymnastics can change the fact that Landrigan told the state court he did not want his attorney to present any mitigating evidence. The Ninth Circuit's ruling to the contrary is unsupportable.

The state court's rejection of Landrigan's ineffective assistance of counsel claim was not an unreasonable application of this Court's *Strickland* jurisprudence. No clearly-established law from this court compels relief. Counsel was not deficient because Landrigan waived mitigation and prevented counsel from presenting mitigating evidence. Landrigan has not established prejudice under *Strickland* because he waived mitigation and there is not even a remote possibility that his sentence would have been different had counsel presented evidence of a genetic component underlying violence in his family. The evidence Landrigan now proffers simply confirms that he is a sociopath. The same state court judge who sentenced Landrigan addressed and rejected Landrigan's ineffective assistance of counsel claim, finding it frivolous in light of Landrigan's express waiver of all mitigation at the time of sentencing. That ruling is entitled to deference under the AEDPA as a factual determination and as a reasonable application of clearly established federal law as determined by this Court. This Court should grant certiorari and reverse the decision of the Ninth Circuit.

Respectfully submitted

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY TIMOTHY LANDRIGAN, a.k.a. Billy Patrick Wayne Hill, *Petitioner-Appellant,* v. DORA B. SCHRIRO, Director, Arizona Department of Corrections, *Respondent-Appellee.*	No. 00-99011 D.C. No. CV-96-02367-PHX-ROS OPINION

Appeal from the United States District Court

for the District of Arizona

Roslyn O. Silver, District Judge, Presiding

Argued and Submitted En Banc

March 24, 2005–San Francisco, California

Submission Withdrawn April 15, 2005

Resubmitted March 1, 2006

Filed March 8, 2006

Before: Mary M. Schroeder, Chief Judge, Harry Pregerson, Stephen Reinhardt, Alex Kozinski, Michael Daly Hawkins, Kim McLane Wardlaw, William A. Fletcher, Marsha S. Berzon, Richard R. Clifton, Consuelo M. Callahan and Carlos T. Bea, Circuit Judges.

Opinion by Judge Hawkins;

Dissent by Judge Bea

SUMMARY

Criminal Law and Procedure/Right to Counsel

The court of appeals affirmed a judgment of the district court in part, reversed in part, and remanded. The court held that a defendant raised a colorable claim that his counsel's performance fell below the objective standard of reasonableness in the penalty phase of his capital murder trial where, despite clues that the defendant began drinking at an early age because his adoptive mother was an alcoholic, that his birth father was on death row, and that he needed help mentally like his father did, counsel did not contact the defendant's birth father, secure a detailed mental health evaluation, or develop a family or social history regarding the defendant's upbringing.

Appellant Jeffrey Landrigan was convicted of first degree murder in Arizona state court and sentenced to death. The Arizona Supreme Court affirmed his conviction and sentence, after which Landrigan petitioned for post-conviction relief in the Arizona Superior Court, urging that his counsel, Dennis Farrell, had been ineffective by failing to investigate and present mitigating evidence at the sentencing proceeding. Landrigan also requested an evidentiary hearing in connection with this claim. Farrell had lined up only two witnesses to testify on his behalf during the sentencing phase: Landrigan's ex-wife and birth mother. Landrigan, however, opposed putting them on the stand. After asking whether Landrigan had instructed his attorney not to present mitigating circumstances, the trial court had asked only, "Do

you know what that means?" Landrigan simply responded, "Yeah." The superior court denied the request for the hearing and the petition, concluding that Landrigan could not argue his counsel was ineffective at sentencing because he had instructed his attorney not to present mitigating evidence. The Arizona Supreme Court summarily denied the petition.

Landrigan petitioned for writ of habeas corpus in federal district court raising a number of claims, including ineffective assistance of counsel. Landrigan alleged that his birth mother sent a letter to Farrell in 1990, informing Farrell that, among other things, Landrigan began drinking at an early age because his adoptive mother was an alcoholic; Landrigan's father was on death row in Arkansas during the time of Landrigan's trial; and Landrigan needed help mentally like his father did. Landrigan sought to expand the record to include declarations by mental health experts and persons familiar with Landrigan's background, and the district court granted this request in part. Landrigan also sought an evidentiary hearing, but the district court denied this request and also denied the petition on the merits. The district court concluded that even if Landrigan's counsel was deficient, Landrigan had not demonstrated he suffered prejudice from his counsel's shortcomings.

Landrigan appealed. A three-judge panel of the court of appeals affirmed the district court's denial of the writ. The court of appeals later granted rehearing en banc.

[1] Under the Antiterrorism and Effective Death Penalty Act (AEDPA), if a petitioner fails to develop in state court the factual basis for a claim, he is restricted in his ability to do so in federal court. These restrictions do not apply, however, if a petitioner exercised due diligence in state court and attempted to develop the factual basis of his claim. [2] Landrigan did not "fail to develop" the factual basis for his ineffective assistance claim in state court. [3] Landrigan tried and failed, through no fault of his own, to develop the facts supporting his ineffective assistance claim at the state-court level. He was therefore

not precluded by AEDPA from seeking an evidentiary hearing in federal court.

[4] The Sixth Amendment right to effective assistance of counsel extends to the sentencing phase of a capital case. **[5]** According to the prevailing standards at the time of Landrigan's sentencing, counsel had an obligation to conduct a thorough investigation of the defendant's background.

[6] Counsel is not deficient for failing to find mitigating evidence if, after a reasonable investigation, nothing has put the counsel on notice of the existence of that evidence. In Landrigan's case, however, the initial investigation did reveal potential mitigating evidence, but that evidence was not developed. Despite these clues, Farrell did not contact Landrigan's birth father, secure a detailed mental health evaluation, or develop a family or social history regarding Landrigan's upbringing in his adoptive home. [7] A comparison of the results of the minimal investigation by Farrell with the amount of available mitigating evidence Landrigan claimed was available left the court of appeals with grave doubts whether Landrigan received effective assistance of counsel during his penalty phase proceeding.

[8] Although Landrigan was unwilling to have his ex-wife and birth mother testify, there was no mention of any other witnesses, and there was no indication that Landrigan would have precluded the introduction of mitigating evidence by other means. [9] The state court's finding that Landrigan instructed his attorney not to present any evidence at the sentencing hearing was not supported by the record and thus amounted to an unreasonable determination of the facts.

[10] There was no indication in the record that Landrigan in any way prohibited or impeded Farrell's ability to investigate or assemble a mitigation defense. [11] Nor did the record indicate that Landrigan's decision was informed and knowing. The trial court's cursory inquiry into Landrigan's purported waiver of all mitigating evidence did not satisfy the required standard. [12] Landrigan did not waive the right to

assert a claim for ineffective assistance of counsel.

[13] There was a significant amount of potential mitigating evidence that was not unearthed or presented to the sentencing judge. [14] If true, Landrigan's allegations were the very sort of mitigating evidence that might well have influenced the judge's appraisal of Landrigan's moral culpability. [15] Presented with the additional mitigating evidence regarding Landrigan's background and emotional and mental problems, there was a reasonable probability that, if Landrigan's allegations were true, the sentencing judge would have reached a different conclusion. [16] It had to be concluded that Landrigan alleged facts that, if demonstrated to be true, presented a colorable claim that he received ineffective assistance of counsel in his capital sentencing proceeding. Landrigan demonstrated a proper basis for an evidentiary hearing.

Judge Bea dissented, writing that the case should not be remanded case for an evidentiary hearing because Landrigan failed to allege facts that, if proven, would demonstrate prejudice.

COUNSEL

Dale A. Baich, Assistant Federal Public Defender, Phoenix, Arizona, for the petitioner-appellant.

James P. Beene, Assistant Attorney General, Capital Litigation Section, Phoenix, Arizona, for the respondent-appellee.

OPINION

HAWKINS, Circuit Judge:

In this appeal, we consider whether petitioner, Jeffrey Timothy Landrigan, received ineffective assistance of counsel in the penalty phase of his capital murder trial. We conclude Landrigan has raised a

colorable claim that his counsel's performance fell below the objective standard of reasonableness required by *Strickland v. Washington*, 466 U.S. 668 (1984), and that he was prejudiced by these errors. We therefore remand to the district court to conduct an evidentiary hearing on Landrigan's claim.

BACKGROUND

In 1989, Landrigan escaped from an Oklahoma prison and soon thereafter murdered Chester Dean Dyer in Arizona. He was convicted of first degree murder in Arizona state court and sentenced to death. The Arizona Supreme Court affirmed his conviction and sentence. *Arizona v. Landrigan*, 176 Ariz. 1, 8 (1993).[1]

Landrigan filed a petition for post-conviction relief in the Arizona Superior Court, urging that his counsel, Dennis Farrell, had been ineffective by failing to investigate and present mitigating evidence at the sentencing proceeding. Landrigan also requested an evidentiary hearing in connection with this claim. The Superior Court denied the request for the hearing and the petition, concluding that Landrigan could not argue his counsel was ineffective at sentencing because he had instructed his attorney not to present mitigating evidence. The Arizona Supreme Court summarily denied the petition.

Landrigan thereafter filed a petition for writ of habeas corpus in federal district court raising a number of claims, including ineffective assistance of counsel. Landrigan sought to expand the record to include declarations by mental health experts and persons familiar with Landrigan's background, and the district court granted this request in part. Landrigan also sought an evidentiary hearing, but the district court denied this request and also denied the petition on the merits. The district court concluded that even if Landrigan's counsel was deficient, Landrigan had not demonstrated he suffered prejudice from his

[1] For a more detailed description of the crime and state court proceedings, *see Landrigan*, 176 Ariz. at 3-4.

counsel's shortcomings.

Landrigan appealed to this court. The district court granted Landrigan a certificate of appealability on several claims, including whether "Landrigan's trial counsel was ineffective at sentencing, depriving Landrigan of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments." A three-judge panel affirmed the district court's denial of the writ. *Landrigan v. Stewart*, 272 F.3d 1221, 1223 (9th Cir. 2001). We granted rehearing en banc. *Landrigan v. Stewart*, 397 F.3d 1235 (9th Cir. 2005).[2]

Since the district court's 1999 denial of the writ and Landrigan's request for an evidentiary hearing and the filing of our now withdrawn panel opinion on November 28, 2001, the Supreme Court has issued a number of significant decisions regarding ineffective assistance of counsel claims. The Court has clarified the duty of an attorney to develop and present mitigating evidence, even when dealing with capital defendants who are "uninterested in helping" or "even actively obstructive" in developing a mitigation case, *Rompilla v. Beard*, 125 S. Ct. 2456, 2462-63 (2005), and also has elaborated on the appropriate measure of prejudice in a capital penalty phase proceeding, *see Wiggins v. Smith*, 539 U.S. 510, 534-38 (2003). Viewing Landrigan's claim in light of these precedents, we find that Landrigan has made a colorable claim that he did not receive effective assistance of counsel in his sentencing. We therefore remand to the district court to conduct an evidentiary hearing.

I.

We review the district court's decision to deny habeas corpus relief de novo. *Bribiesca v. Galaza*, 215 F.3d 1015, 1018 (9th Cir.

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[2] We initially heard argument in March 2005, but deferred submission pending this court's en banc decision in *Summerlin v. Schriro*, 427 F.3d 623 (9th Cir. 2005) (en banc).

2000). Because Landrigan filed his petition after April 24, 1996, it is governed by the standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d)(1). Under AEDPA, Landrigan is entitled to a writ if the state court's denial of his claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.*

[1] The district court's decision to deny an evidentiary hearing is reviewed for an abuse of discretion. See *Earp v. Ornoski*, 431 F.3d 1158, 1166 (9th Cir. 2005). Under AEDPA, if a petitioner fails to develop in state court the factual basis for a claim, he is restricted in his ability to do so in federal court. *See* 28 U.S.C. § 2254(e)(2). These restrictions do not apply, however, if a petitioner exercised due diligence in state court and attempted to develop the factual basis of his claim. As the Supreme Court has explained, "a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Michael Wayne Williams v. Taylor*, 529 U.S. 420, 432 (2000). The Court has further noted that "[d]iligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 437.

[2] Landrigan did not "fail to develop" the factual basis for his ineffective assistance claim in state court. In his state habeas petition, Landrigan made a general claim that his counsel had failed to investigate and develop potential mitigating evidence, including his biological mother's use of drugs and alcohol during gestation, his adoptive mother's alcoholism and its adverse effect on Landrigan's upbringing, and information regarding his biological father and his family history of violence. Landrigan sought the appointment of a medical expert to assist in establishing mitigating evidence regarding the effects of drug and alcohol use on a developing fetus and also requested an evidentiary hearing on his ineffective assistance claim. Landrigan supported his petition with various declarations by available witnesses who attested they were never contacted by Landrigan's trial

attorney, and with documentary evidence regarding criminal psychobiology and congenital determinants of violence. The state court denied both the appointment of an expert and Landrigan's request for an evidentiary hearing.

[3] Landrigan tried and failed, through no fault of his own, to develop the facts supporting his ineffective assistance claim at the state-court level. He is therefore not precluded by AEDPA from seeking an evidentiary hearing in federal court. *See Earp*, 431 F.3d at 1169; *Jones v. Wood*, 114 F.3d 1002, 1013 (9th Cir. 1997). In such circumstances, Landrigan is entitled to an evidentiary hearing if he can establish a "colorable claim" for relief. *See Earp*, 431 F.3d at 1173.

II.

[4] The Sixth Amendment right to effective assistance of counsel extends to the sentencing phase of a capital case. *Silva v. Woodford*, 279 F.3d 825, 836 (9th Cir. 2002). We analyze Landrigan's claim that he was deprived of this right pursuant to the standards set forth by the Supreme Court in *Strickland*: Landrigan must demonstrate that his counsel's representation "fell below an objective standard of reasonableness" and that there is a reasonable probability that counsel's unprofessional errors "undermine confidence in the outcome of the proceeding." 466 U.S. at 688, 694.

A.

[5] According to the prevailing standards at the time of Landrigan's sentencing, counsel had an obligation to conduct a thorough investigation of the defendant's background. *See Terry Williams v. Taylor*, 529 U.S. 362, 396 (2000) ("*T. Williams*") (citing 1 ABA Standards for Criminal Justice 4-4.1, cmt. at p. 4-55 (2d ed. 1980)); *Rompilla*, 125 S. Ct. at 2466. As this court has also noted, when it comes to the penalty phase of a capital trial, "[i]t is imperative that all relevant mitigating information be unearthed for consideration." *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999). We begin by considering what steps Landrigan's counsel took in his investigation.

See Wiggins, 539 U.S. at 522-23 (court should first focus on whether the investigation is itself reasonable); *Strickland*, 466 U.S. at 690-91 (courts will defer to counsel's choices, if made after conducting a reasonable investigation).

1. On the record before us, it appears that Landrigan's counsel did little to prepare for the sentencing aspect of the case. He did obtain several medical documents indicating Landrigan had a long history of substance abuse and included this information in Defendant's Sentencing Memorandum Concerning Mitigation. He also had a psychologist, Mickey McMahon, evaluate Landrigan to obtain an "initial impression," but did not provide him with any relevant background information on Landrigan to assist in the evaluation. *See, e.g., Clabourne v. Lewis*, 64 F.3d 1373, 1385 (9th Cir. 1995) (counsel ineffective for inadequately preparing psychologist). Although the psychologist recommended that he perform additional testing, Farrell would not authorize any follow-up tests. Dr. McMahon's declaration describes his experience with Farrell as "quite different from the working relationship I had with counsel in other death penalty cases."

Landrigan's counsel also hired an investigator, who spent a total of thirteen hours on the case, but none of this work was directed towards sentencing phase considerations. The investigator claims that he had very little interaction with counsel about the case and that he found this "quite frustrating."

Prior to the sentencing, Farrell also spoke briefly with two family members — Landrigan's ex-wife and his birth mother. At the sentencing hearing, Farrell advised the court that he expected Landrigan's ex-wife to verify Landrigan's history of substance abuse; state that Landrigan had been a loving, caring husband; and explain the circumstances of one of Landrigan's prior convictions. Farrell also proffered that Landrigan's birth mother would testify about her drug and alcohol use during her pregnancy, and that after developing this testimony, Farrell was then hoping to have a recess to talk to some experts about the effect on the fetus. But even this dialogue with the

court revealed that he had not, during pre-sentencing investigation, ascertained any specifics about Landrigan's mother's drug use or contacted any experts on the subject in advance of the hearing.

[6] "[C]ounsel is not deficient for failing to find mitigating evidence if, after a reasonable investigation, nothing has put the counsel on notice of the existence of that evidence." *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1998) (quoting *Matthews v. Evatt*, 105 F.3d 907 (4th Cir. 1997)) (internal quotation marks omitted). In this case, however, the initial investigation *did* reveal potential mitigating evidence, but that evidence was not developed. In addition to the evidence discussed above, Landrigan alleges that his birth mother sent a letter to Farrell in April 1990, informing Farrell that, among other things, (1) Landrigan began drinking at an early age because his adoptive mother was an alcoholic and would walk around nude in front of him, (2) Landrigan's father was on death row in Arkansas and the "blood link to Darrel [and] I are what has messed up his whole life," and (3) "Jeff needs help mentally like his father did." Despite these clues, Farrell did not contact Landrigan's birth father, secure a detailed mental health evaluation, or develop a family or social history regarding Landrigan's upbringing in his adoptive home.

Landrigan alleges that with some minimal investigation, Farrell could have uncovered Landrigan's tortured family history: Landrigan's birth parents were troubled individuals who abused drugs and alcohol; Landrigan's biological father was a violent man who, at the time of Landrigan's trial, was on death row in Arkansas; Landrigan's mother abandoned Landrigan when he was six months old, leaving him in a day nursery and never returning; Landrigan was later adopted, but unfortunately, his adoptive mother was also an alcoholic, at times consuming a fifth of vodka or more a day until she passed out; she would frequently slap him and once even hit him with a frying pan; his childhood was difficult — he exhibited abandonment and attachment problems, had difficulty sleeping, and had violent temper tantrums even at a very early age; Landrigan had serious drug and alcohol problems while very young, and he even overdosed in class in eighth or ninth

grade; at the time he committed the murder in Arizona, had had used amphetamines for forty-two straight days and had slept on only about fourteen of those days.

In 1998, following a thorough neuropsychological evaluation, Dr. Thomas Thompson reported that the convergence of the above-mentioned factors — Landrigan's genetic makeup, *in utero* exposure to teratogenic substances, early maternal rejection, and his troubled interactions with his adoptive family — resulted in disordered behavior that was "beyond the control of Mr. Landrigan," and left him unable to "function in a society that expects individuals to operate in an organized and adaptive manner, taking into account the actions and consequences of their behavior and their impact on society and its individual members."

[7] **2.** A comparison of the results of the minimal investigation by Farrell with the amount of available mitigating evidence Landrigan claims was available leaves us with grave doubts whether Landrigan received effective assistance of counsel during his penalty phase proceeding. The state urges, however, that Farrell's investigatory shortcomings are irrelevant because Landrigan would not permit the introduction of mitigating evidence in the sentencing phase of his trial.

The state misreads what occurred at the sentencing hearing. Landrigan's counsel had lined up only two witnesses to testify on his behalf during the sentencing phase: Landrigan's ex-wife and birth mother. Landrigan, however, opposed putting them on the stand. His lawyer explained Landrigan's wishes to the sentencing judge as follows:

> MR. FARRELL: Your Honor, at this time . . . I have two witnesses that I wished to testify before this Court, one I had brought in from out of state and is my client's ex-wife, Ms. Sandy Landrigan. The second witness is my client's natural mother, Virginia Gipson. I believe both of those people had some important

evidence that I believed the Court should take into mitigation concerning my client. However, Mr. Landrigan has made it clear to me—Jeffrey, the defendant—that he does not wish anyone from his family to testify on his behalf today.

I have talked with Sandra Landrigan, his ex-wife. I have talked a number of times with her and confirmed what I thought was important evidence that she should present for the Court. And I have also talked with Ms. Gipson, and her evidence I think is very important and should have been brought to this Court's attention. Both of them, after talking with Jeff today, have agreed with their, in one case son and the other ex-husband, they will not testify in his behalf.

THE COURT: Why not?

MR. FARRELL: Basically it's at my client's wishes, Your Honor. I told him that in order to effectively represent him, especially concerning the fact that the State is seeking the death penalty, any and all mitigating factors, I was under a duty to disclose those factors to this Court for consideration regarding the sentencing. *He is adamant he does not want any testimony from his family, specifically these two people that I have here, his mother, under subpoena, and as well as having flown in his ex-wife.*

I have advised him and I have advised him very strongly that I think it's very much against his interests to take that particular position. I have also advised both the witnesses I could have them sworn in and ask them questions, but they are under an obligation to do what they feel is right, Your Honor. They are looking after Jeff's interests.

> I'm coming from the position that I have to bring certain evidence before this Court. I'm at a loss. I don't know what this Court wishes to do.

[Emphasis added.]

[8] The state trial court was thus confronted with a situation where the defense lawyer had only prepared to present two mitigation witnesses—Landrigan's ex-wife and birth mother—and Landrigan objected to putting them on the stand. It is clear from this statement by counsel that Landrigan was unwilling to have these two particular people testify, but there is no mention of any other witnesses, and there is no indication that Landrigan would have precluded the introduction of mitigating evidence by other means.[3] The possibility of other evidence or witnesses simply never came up, doubtless because defense counsel had no other evidence to present.

The colloquy that followed between the sentencing judge and Landrigan must be read against this backdrop:

> THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish for him to bring any mitigating circumstances to my attention?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Do you know what that means?
>
> THE DEFENDANT: Yeah.

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[3] *See Summerlin*, 427 F.3d at 637-39 (spontaneous objection to presentation of one witness does not excuse failure to present penalty phase defense); *Stankewitz v. Woodford*, 365 F.3d 706, 721-22 (9th Cir. 2004) (opposition to calling family members or experts as witnesses does not excuse an attorney from interviewing experts and family members to obtain mitigating evidence.

THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?

THE DEFENDANT: Not as far as I'm concerned.

At the time the sentencing judge asked Landrigan whether he instructed his lawyer not to present any mitigating circumstances, the only mitigating evidence that the lawyer *could* have brought to the court's attention was the testimony of the two witnesses. Landrigan's response to the court's rather vague question cannot, in context, be construed as anything more than confirmation that he did not want his birth mother and ex-wife testifying on his behalf. Indeed, due to his lawyer's meager investigation, there was no other mitigating evidence available to which Landrigan could object or not object.

When the sentencing judge then asked Landrigan whether there were any *other* mitigating circumstances to be taken into account, Landrigan replied that there were not. This, of course, was a direct consequence of the fact that his counsel had not presented him with any options other than the two witnesses he opposed. Had his lawyer conducted an investigation and uncovered other types of mitigating evidence, Landrigan might well have been able to direct the court to other mitigating circumstances. Viewing the entire colloquy in proper context, it is clear that the sentencing judge was only inquiring about Landrigan's willingness to allow his birth mother and ex-wife to testify, and that Landrigan simply confirmed that he was not.

[9] It was not until the Arizona Supreme Court (on direct appeal) and the Arizona Superior Court (on habeas review) examined the colloquy that the sentencing judge's questioning was taken out of context. The state supreme court found that, "[a]t the sentencing hearing, defendant instructed his lawyer not to present any mitigating evidence." And the state habeas court similarly found that Landrigan "instructed his attorney not to present any evidence at the sentencing

hearing." In light of what actually transpired at the sentencing hearing, such an overly broad characterization of the colloquy is not supported by the record and thus amounts to an "unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2).

[10] 3. Even were we to overlook the state habeas court's flawed factual finding that Landrigan unequivocally waived presentation of all mitigating evidence, the court's conclusion that Landrigan's claim was therefore necessarily "frivolous" and "meritless" was an unreasonable application of United States Supreme Court precedent. *See id.* § 2254(d)(1). Landrigan's apparently last-minute decision cannot excuse his counsel's failure to conduct an adequate investigation *prior* to the sentencing. *Cf. Wiggins*, 539 U.S. at 522-23 (focus should be on whether investigation was itself reasonable, not whether counsel should have presented a mitigation case);[4] *see also Stankewitz*, 365 F.3d at 722 (counsel has duty to investigate what evidence potentially could have been presented and discuss this evidence with accused in order to obtain an informed and knowing waiver); *Silva*, 279 F.3d at 839-40 (instruction not to call parents as witnesses did not preclude counsel from investigating background). There is no indication in the current record that Landrigan in any way prohibited or impeded Farrell's ability to investigate or assemble a mitigation defense. And even if he had, the prevailing standards, even at the time of Landrigan's trial, "suggest that a lawyer's duty to investigate is virtually absolute, regardless of a client's expressed wishes." *Silva*, 279 F.3d at 840 (citing 1 ABA Standards for Criminal Justice 4-4.1 cmt. at 4-55); *see also T. Williams*, 529 U.S. at 396 (citing same).

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[4] Although *Wiggins* is a recent Supreme Court case, it applied the familiar *Strickland* inquiry applicable to ineffective assistance claims in a post-AEDPA case. Indeed, the Court in *Wiggins* expressly stated that the case presented the same issue as in *Strickland* and that it was applying the "clearly established precedent of *Strickland*." 539 U.S. at 521. Wiggins's trial took place in 1989, one year prior to Landrigan's 1990 trial. *Id.* at 514-15. Therefore, the Court's reasoning in *Wiggins* is fully applicable to Landrigan's case.

[11] Nor does the record indicate that Landrigan's decision was informed and knowing. It is "difficult for an attorney to advise a client of the prospects of success or the potential consequences of failing to present mitigating evidence when the attorney does not know that such evidence exists." *Douglas v. Woodford*, 316 F.3d 1079, 1089 (9th Cir. 2003); *see also Stankewitz*, 365 F.3d at 722 (petitioner's objection to mitigating evidence apparently not "informed and knowing" because counsel did not conduct an adequate investigation). The trial court's dialogue with Landrigan tells us little about his understanding of the consequences of his decision: After asking whether Landrigan had instructed his attorney not to present mitigating circumstances, the court asked only, "Do you know what that means?" Landrigan simply responded, "Yeah." There was no further exploration by the court into Landrigan's understanding, or what advice his attorney had given him outside of court.

As we recently explained:

> If a client has elected to forego legal proceedings that could avert the imposition of the death penalty, then a court must make the determination "whether he has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises."

Summerlin, 427 F.3d at 639 (quoting *Rees v. Peyton*, 384 U.S. 312, 314 (1966)). The trial court's cursory inquiry into Landrigan's purported waiver of all mitigating evidence did not satisfy this requirement.

[12] For all of the foregoing reasons, Landrigan has not waived the right to assert a claim for ineffective assistance of counsel. Moreover, Landrigan has alleged facts that, if true, would establish that his counsel was ineffective for failing to investigate and discover important mitigating evidence. This alone, however, would not entitle

Landrigan to habeas relief or even to an evidentiary hearing. We therefore turn to the issue of prejudice.

B.

To establish prejudice, Landrigan must demonstrate a reasonable probability that Farrell's deficiencies "undermine confidence in the outcome" of the proceeding. *Strickland*, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.") To assess prejudice in a capital penalty phase proceeding, the Supreme Court has directed us to "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534.

That evidence includes both the evidence adduced at trial *and* the evidence adduced in habeas proceedings. *See id.* at 536; *T. Williams*, 529 U.S. at 397-98. In evaluating prejudice, the district court improperly refused to consider additional facts proffered by Landrigan, such as expert testimony regarding Landrigan's organic brain dysfunction, because the court erroneously concluded that Landrigan had failed to exhaust this claim in state court. In state court, Landrigan asserted that his counsel was ineffective because Farrell had failed to undertake a reasonable investigation of mitigating factors, including information that could have been derived from Landrigan's biological father and his adoptive sister. Landrigan summarized his claim as follows:

> Where a defendant's crime is attributable to a disadvantaged background or emotional or mental problems the defendant is less culpable than one without the excuse. *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). *See also, State v. Wallace*, 160 Ariz. 424, 427, 773 P.2d 983, 986 (1989), *cert. denied*, 494 U.S. 1047 (1990). Due to ineffective assistance from trial counsel at sentencing,

this Honorable Court did not have a complete and accurate picture of Petitioner's background.

The additional information offered by Landrigan in support of his federal habeas claim does not "fundamentally alter" the ineffective assistance claim presented to the state court. It simply provides additional evidentiary support for the claim, in particular with respect to the prejudice prong of *Strickland*. *See Vasquez v. Hillery*, 474 U.S. 254, 260 (1986); *see also Belmontes v. Brown*, 414 F.3d 1094, 1117-18 (9th Cir. 2005) ("[N]ew factual allegations do not render a claim unexhausted unless they fundamentally alter the legal claim already considered by the state courts." (quoting *Chacon v. Wood*, 36 F.3d 1459, 1468 (9th Cir. 1994) (quoting *Vasquez*, 474 U.S. at 260))) (internal quotation marks omitted).

[13] As discussed above, there was a significant amount of potential mitigating evidence that was not unearthed or presented to the sentencing judge. Landrigan alleges he was exposed to alcohol and drugs *in utero*, which may have resulted in cognitive and behavioral deficiencies consistent with fetal alcohol syndrome. He was abandoned by his birth mother and suffered abandonment and attachment issues, as well as other behavioral problems throughout his childhood. His adoptive mother was also an alcoholic, and Landrigan's own alcohol and substance abuse began at an early age. Based on his biological family's history of violence, Landrigan claims he may also have been genetically predisposed to violence.

[14] If true, Landrigan's allegations are "the very sort of mitigating evidence that 'might well have influenced the [judge's] appraisal of [Landrigan's] moral culpability.'" *Earp*, 431 F.3d at 1179 (quoting *T. Williams*, 529 U.S. at 398). "Evidence regarding social background and mental health is significant, as there is a 'belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional or mental problems, may be less culpable than defendants who have no such excuse.'" *Douglas*, 316 F.3d at 1090 (quoting *Boyde v. California*, 494

U.S. 370, 382 (1990).[5] We also note that in finding Landrigan's background or emotional character was not a mitigating circumstance, the state sentencing judge specifically noted that he had "received very little information concerning the defendant's difficult family history," implying a more complete picture could have tipped the scale in Landrigan's favor.

In comparison, there were two aggravating circumstances relied upon by the sentencing judge: (1) the defendant had prior felony convictions involving the use or threatened use of violence on another person, and (2) the defendant committed the offense with the expectation of receiving pecuniary gain. *See* Ariz. Rev. Stat. §§ 13-703(F)(2), (5). There was limited evidence regarding the pecuniary gain aggravator. The judge noted that the victim's apartment had been ransacked as if the perpetrator were looking for something, and that this demonstrated an expectation of pecuniary gain, even though Landrigan did not actually steal anything of value. On the other hand, Landrigan had been previously convicted of two violent crimes — second degree murder for the stabbing death of an individual in Oklahoma and assault and battery with a deadly weapon for stabbing another inmate while serving his second degree murder sentence.

[15] Notwithstanding these obviously serious prior offenses, Landrigan still may have been prejudiced by his attorney's alleged

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[5] The dissent seizes upon Landrigan's expert's diagnosis of antisocial personality disorder and analyzes whether such a disorder is sufficient to justify mitigation. [Dissent at 2351-52]. Yet this diagnosis is only a small piece of the puzzle; the crux of Landrigan's argument is that the sentencing judge was never apprised of the full panoply of circumstances that, in the expert's opinion, converged to result in "disordered behavior [that] was beyond the control of Mr. Landrigan." The dissent also suggests that Landrigan's trial behavior would have negated any attempt to elicit sympathy [Dissent at 2353-55], yet Landrigan contends this behavior was consistent with the expert's analysis of limited impulse control and an inability to take into account the consequences of his behavior. Indeed, if Landrigan's counsel had offered such mental health information, it could have actually explained his courtroom behavior and tempered its effect.

shortcomings. Even in cases involving particularly heinous murders, or substantial criminal histories, a defendant can be prejudiced by an attorney's failure to investigate and present mitigating evidence that could influence the judge's appraisal of moral culpability. *See T. Williams*, 529 U.S. at 398; *Stankewitz*, 365 F.3d at 724 (mitigating evidence could have fostered sympathy for defendant and could also have diminished the aggravating impact of the prosecution's case). Presented with the additional mitigating evidence regarding Landrigan's background and emotional and mental problems, there is a reasonable probability that, if Landrigan's allegations are true, the sentencing judge would have reached a different conclusion.

III.

Of course, to this point, Landrigan's evidence has not been tested. Farrell has not been given an opportunity to explain what steps were taken in his investigation or why he did not do more; Landrigan's accounts of his childhood have not been explored; and the state has not had an opportunity to cross-examine his experts or challenge the strength of their opinions. We note this only to emphasize that we are not opining on what the district court's ultimate resolution of this issue should be; we conclude only that Landrigan has surpassed the relatively "low bar" of alleging a colorable claim for relief. *Earp*, 431 F.3d at 1170.

[16] We conclude Landrigan has alleged facts that, if demonstrated to be true, present a colorable claim that he received ineffective assistance of counsel in his capital sentencing proceeding. Landrigan has demonstrated a proper basis for an evidentiary hearing.[6]

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[6] We adopt the panel's holdings with respect to the additional sentencing issues raised in Landrigan's certificate of appealability. 272 F.3d at 1229-31.

AFFIRMED in part, REVERSED in part, and REMANDED for an evidentiary hearing.

BEA, Circuit Judge, with whom Circuit Judge Callahan joins, dissenting:

Although I agree with the majority's conclusion that counsel's limited investigation of Landrigan's background fell below the standards of professional representation prevailing in 1990, I would not remand this case for an evidentiary hearing because Landrigan has failed to allege facts that, if proven, would demonstrate *Strickland* prejudice.

We "review do novo [a] district court's interpretation of AEDPA standards governing the grant or denial of an evidentiary hearing." *Earp*, 431 F.3d at 1166. We may reverse the denial of an evidentiary hearing only if the district court abused its discretion. *Id.*

To establish entitlement to an evidentiary hearing, Landrigan must demonstrate an objectively reasonable probability that, had counsel proved the mitigating facts now alleged, the sentencing judge would not have imposed the death penalty. *See Summerlin*, 427 F.3d at 643. Landrigan alleges that his birth mother exposed him to alcohol and drugs *in utero* and later abandoned him, that he has a genetic predisposition for violence, that his adoptive mother was an alcoholic, and that, as a result of all these factors, he has antisocial personality disorder.[1] Whether these alleged facts create an objectively reasonable

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[1] Contrary to the majority's contention, to focus on the potential mitigating effect of Landrigan's purported antisocial personality disorder is not to "seize" on a "small piece" of some larger "puzzle" of mitigating circumstances that counsel failed to investigate or present. Maj. Op. at 2348 n.5. As the majority opinion itself acknowledges, all the mitigating circumstances Landrigan faults counsel for not raising "converge" to support the suggestion that he suffers from antisocial personality disorder and cannot control his actions. *See id.* at 2340 Antisocial personality disorder is the crux of Landrigan's ineffective assistance of counsel claim.

probability that Landrigan would have received a different sentence must be considered in light of the particular circumstances of his case. *See Smith v. Stewart*, 140 F.3d 1263, 1270 (9th Cir. 1998) (explaining that the mitigating effect of antisocial personality disorder is context-dependent and that, in Arizona, the disorder "has often been treated on appeal as insufficient to justify mitigation"). Under these standards, three separate factors convince me there is no reasonable probability that Landrigan would have received a different sentence had his counsel proved the mitigating facts now alleged.

First, the mitigating effect of antisocial personality disorder is greater when there is evidence that the disorder "controlled [the] defendant's conduct or impaired his mental capacity" than when evidence suggests that, at the time of the crime, the defendant "possessed the ability to restrain himself." *State v. Brewer*, 826 P.2d 783, 802-03 (Ariz. 1992). For example, in *Brewer*, the defendant's antisocial personality disorder was insufficient to tilt the balance of mitigating and aggravating factors in favor of leniency because, notwithstanding his disorder, he had "resisted whatever impulses he may have experienced long enough to insure his own safety by locking the [victim's] roommate's dog in another room before commencing his attack on the victim." *Id.* at 803.

Here, Landrigan has submitted an expert declaration suggesting in passing that because of his antisocial personality disorder he has "very limited impulse control." The evidence, however, is that on the occasion of the murder at issue Landrigan was able to control his impulses long enough to cultivate the victim's trust and attempt to profit from their encounter. The trial testimony of one of the victim's friends, "Michael," was that prior to the murder the victim called him three times. During the first phone call, the victim reported that he and Landrigan were together drinking beer. Approximately fifteen minutes later, the victim called a second time to say he was in the middle of sexual intercourse with Landrigan. Shortly thereafter, the victim called to ask whether Michael could get Landrigan a job. Thus, just as the defendant in *Brewer* was able to control his impulses long enough to

take steps to protect his physical safety, Michael's testimony suggests Landrigan was able to control his murderous impulses long enough to earn his victim's trust, engage him in sexual relations, and allow the victim to try to get him a job. This evidence diminishes the mitigating effect of his alleged antisocial personality disorder.

Second, as the three-judge panel that initially heard Landrigan's appeal correctly recognized, in Landrigan's case the mitigating value of any proven genetic predisposition for violence would not have outweighed its aggravating tendency to suggest Landrigan was undeterrable and, even from prison, would present a future danger to society. *Landrigan v. Stewart*, 272 F.3d 1221, 1228-29 (9th Cir. 2001). One of the two statutory aggravating factors the sentencing judge found was that Landrigan had prior felony convictions involving the use or threatened use of violence on another person. *See* Ariz. Rev. Stat. § 13-703(F)(2). Landrigan had murdered his best friend and then, while incarcerated for that crime, had brutally stabbed a fellow inmate. In light of this history, and the fact that Landrigan committed the murder for which he was convicted in the present case after escaping from prison, the potential for future dangerousness—including peril to future fellow inmates—inherent in Landrigan's alleged genetic pre-disposition for violence would have negated its mitigating capacity for evoking compassion in the sentencing judge. *See People v. Franklin*, 656 N.E.2d 750, 761 (Ill. 1995) ("Although this evidence [regarding defendant's psychological problems and violent family history] could have evoked compassion in the jurors, it could have also demonstrated defendant's potential for future dangerousness and the basis for defendant's past criminal acts. The evidence of defendant's mental illness may also have shown that defendant was less deterrable or that society needed to be protected from him.").

Third, but by no means least, Landrigan's behavior at trial would have negated any effort by counsel to elicit sympathy based on a genetic or biological predisposition toward violence. The three-judge panel that originally heard this appeal aptly described Landrigan's behavior as follows:

Landrigan was not willing to merely express his opinions to counsel and, once having given those indications about his feelings, recede into comparative silence as counsel went about the business of conducting the proceeding. Quite the contrary; Landrigan took an actively aggressive posture, which ensured that counsel's attempts to place mitigating factors before the sentencing court would come a cropper. Each of counsel's feints in the mitigating direction brought a statement from Landrigan that painted an even bleaker picture and made matters even worse. But we will not merely resort to characterization; we will illustrate the situation with Landrigan's own words.

In an attempt to soften the effect of the fact that Landrigan had previously murdered his best friend, Greg Brown, counsel said that as Landrigan was walking away, Brown, a much larger man, rushed up and attacked him. Landrigan, who happened to be carrying a knife, defended himself and unfortunately killed Brown. A plausible story, but Landrigan would have none of it. His attorney got it all wrong. Rather, said he, "When we left the trailer, Greg went out of the trailer first. My wife was between us. I pulled my knife out, then I was the one who pushed her aside and jumped him and stabbed him. He didn't grab me. I stabbed him." In other words, Landrigan had come from behind and acted in a murderous way. That was all there was to it.

Landrigan behaved similarly when counsel tried to envelop the assault on another prison inmate in a brume of self defense by suggesting that Landrigan had been threatened by the victim, who was a friend of Greg

Brown and Greg's father. Landrigan responded thusly: "That wasn't Greg Brown's dad's friend or nothing like that. It was a guy I got in an argument with. I stabbed him 14 times. It was lucky he lived. But two weeks later they found him hung in his cell." Again, Landrigan had unnecessarily behaved in an extremely violent and murderous way toward another human being.

And when counsel tried to burnish Landrigan's benighted past by indicating that before Brown's murder, Landrigan, for at least one brief shining moment, was a "loving, caring husband," who had married and was taking care of his wife and her child by "working . . . at a golf course during the year-and-a-half" preceding the killing, Landrigan demurred. He explained: "Well, I wasn't just working. I was doing robberies supporting my family. We wasn't married. We wasn't married in Arizona. We lived in Oklahoma. I mean, you know, he's not getting the story straight. Why have him tell somebody else's story in the first fucking place?"

If that were not enough, Landrigan made the following presentation when the court asked if he would like to say anything in his own behalf:

> Yeah. I'd like to point out a few things about how I feel about the way this shit, this whole scenario went down. I think that it's pretty fucking ridiculous to let a fagot be the one to determine my fate, about how they come across in his defense, about I was supposedly fucking this dude. This never happened. I think the whole thing stinks. I think if you

> want to give me the death penalty, just bring it right on. I'm ready for it.

Landrigan, 272 F.3d at 1226-27.[2]

In light of (1) the evidence that Landrigan could and did control his murderous impulses, (2) the probability that any mitigating value of evidence of genetic or biological predisposition for violence would have been overwhelmed by the evidence's aggravating tendency to show that Landrigan was undeterrable, and (3) Landrigan's menacing behavior at trial, Landrigan has not alleged facts that if proven would create an objectively reasonable probability that he would have received a different sentence. Accordingly, it was not an abuse of discretion for the district court to deny him an evidentiary hearing. I would affirm the district court's decision in its entirety.

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[2] It appears that Landrigan continues to question his counsel's approaches to this case, as indicated by his hand-written letter to this court of August 16, 2005, stating:

> As of today, I want to withdraw my petition and drop all appeals. I no longer wish to pursue any action from your court or any others, and want my execution date to be set as soon as possible. Thank you.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY TIMOTHY LANDRIGAN, a.k.a. Billy Patrick Wayne Hill,
Petitioner-Appellant,

v.

TERRY STEWART, Director, Arizona Department of Corrections,
Respondent-Appellee.

No. 00-99011

D.C. No. CV-96-02367-PHX-ROS

OPINION

Appeal from the United States District Court
for the District of Arizona
Roslyn O. Silver, District Judge, Presiding

Argued and Submitted
November 8, 2001–San Francisco, California

Filed November 28, 2001

Before: Ferdinand F. Fernandez, Pamela Ann Rymer, and Kim McLane Wardlaw, Circuit Judges.

Opinion by Judge Fernandez

COUNSEL

Dale A. Baich, Assistant Federal Public Defender, Phoenix, Arizona, for the petitioner-appellant.

James P. Beene, Deputy Attorney General, Phoenix, Arizona, (argued); Joseph T. Maziarz, Assistant Attorney General, Phoenix, Arizona, for the respondent-appellee.

OPINION

FERNANDEZ, Circuit Judge:

Jeffrey Timothy Landrigan was convicted of the murder of Chester Dean Dyer in the state of Arizona and was sentenced to death. His conviction was affirmed by the Supreme Court of Arizona on direct review, his state petition for post-conviction relief was denied by the state courts, and his petition for habeas corpus under 28 U.S.C. § 2254 was denied by the district court. He appealed and his primary claim is that counsel was ineffective at sentencing. We affirm.

BACKGROUND

In early November of 1989, Landrigan was incarcerated in an Oklahoma Department of Corrections Facility. He was serving a term of 20 years imprisonment[1] for the murder of his "best friend," Greg Brown; he had stabbed Brown to death in 1982, and had been in prison since then. While in custody, Landrigan had not been quiescent. He had an argument with another prison inmate and repeatedly stabbed him, a crime for which Landrigan was convicted in March of 1986.

Alas, on November 10, 1989, Landrigan escaped from custody in Oklahoma, and soon surfaced in Phoenix, Arizona. Within a month, he had met the victim, Chester Dean Dyer, a homosexual man who

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[1] His sentence was actually 40 years, but 20 years of it had been suspended.

often tried to pick up other men by flashing a wad of money. On December 13, 1989, Landrigan went to Dyer's apartment where the two of them drank beer, and had other pleasurable interactions, In fact, the situation was so friendly that Dyer called another friend to tell him about it, and even asked that friend if he could get Landrigan a job. The friend then spoke with Landrigan about that possibility.

Thereafter, Landrigan slew the victim by strangling and stabbing him. Dyer's body was found two days later and the Arizona Supreme Court described the murder scene in the following way:

> [Dyer] was fully clothed, face down on his bed, with a pool of blood at his head. An electrical cord hung around his neck. There were facial lacerations and puncture wounds on the body. A half-eaten sandwich and a small screwdriver lay beside it. Blood smears were found in the kitchen and bathroom. Partial bloody shoeprints were on the tile floor.

Arizona v. Landrigan, 176 Ariz. 1, 3, 859 P.2d 111, 113 (1993) (Landrigan I). It only remains to add that an ace of hearts, from a deck of cards depicting naked men in sexual poses, was carefully propped on Dyer's back, and the rest of the deck was strewn across the bed. The apartment had been ransacked, and there were drops of blood on the bedding, the kitchen sink and the bathroom counter top.

Landrigan was soon caught, and was prosecuted for first degree murder and other crimes, convicted in a jury trial, and ultimately sentenced to death by the trial judge, who found aggravating circumstances, but insufficient mitigating circumstances to outweigh them. She opined that although the crime was not out of the ordinary as first degree murders go, Landrigan was. As she put it:

> I find the nature of the murder in this case is really not out of the ordinary when one considers first degree murder, but I do find that Mr. Landrigan appears to be somewhat of an exceptional human being. It appears that Mr. Landrigan is a person who has no scruples and

> no regard for human life and human beings and the right to live and enjoy life to the best of their ability, whatever their chosen life-style might be. Mr. Landrigan appears to be an amoral person.

Landrigan appealed to the Arizona Supreme Court and raised a number of issues, including improper imposition of the death sentence and ineffective assistance of counsel at and before sentencing. That court affirmed. See id. at 8, 859 P.2d at 118.

Landrigan then filed a petition in the Arizona Superior Court for post-conviction relief in which he, again, asserted ineffective assistance of counsel because of counsel's failure to present mitigating evidence. The post-conviction judge, who had been the trial judge, denied post-conviction relief; the Arizona Supreme Court denied review. Landrigan then filed his present petition for habeas corpus relief in the district court. It, too, denied relief, and this appeal ensued.

STANDARD OF REVIEW

We review the district court's decision to deny a 28 U.S.C. § 2254 habeas corpus petition de novo. See Bribiesca v. Galaza, 215 F.3d 1015, 1018 (9th Cir. 2000). Because Landrigan filed his petition after April 24, 1996, it is governed by the standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1). To obtain habeas corpus relief under the AEDPA, Landrigan must show that the state courts' denial of his ineffective assistance of counsel claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Id.

DISCUSSION

A. Ineffective Assistance of Counsel

Landrigan's principal claim is that he had ineffective assistance of counsel at his penalty phase hearing because counsel failed to present

mitigating evidence. Certainly, Landrigan is entitled to have mitigating evidence presented on his behalf; certainly, little was presented here. Were that all there was to say, this might have been a relatively easy case for reversal; as it is, the opposite conclusion is called for. The standards we must use are well known, and we will but synopsize them before turning to the circumstances of this case.[2]

We must decide whether counsel was ineffective based on the now familiar factors set forth by the Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to obtain relief, [Landrigan] must show both that counsel "was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment," and that the deficiency prejudiced him. Id. at 687, 104 S. Ct. at 2064.

[2] The first factor requires the defendant to show "that counsel's representation fell below an objective standard of reasonableness." Id. at 688, 104 S. Ct. at 2064. And in determining whether it did, we must be "highly deferential," avoid "the distorting effects of hindsight," and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689, 104 S. Ct. at 2065.

The second factor requires that counsel's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687, 104 S. Ct. at 2064. That in turn means that there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068. And that in turn means that the unprofessional errors were egregious enough "to undermine confidence in the outcome." Id.; see also United States v. Span, 75 F.3d 1383, 1387 (9th Cir. 1996); Clabourne v. Lewis, 64 F.3d 1373, 1378 (9th Cir. 1995).

Of course, all of these rules apply to the death penalty phase of a

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[2] The next four paragraphs of this opinion are quoted from Smith v. Stewart, 140 F.3d 1263, 1268-69 (9th Cir. 1998). For ease of reading, they are not indented or shown with any quotation marks that are not already contained in Smith itself.

prosecution. Strickland itself was a murder prosecution, and the Supreme Court did apply its rules to the death penalty part of the case. See 466 U.S. at 698-701, 104 S. Ct. at 2070-71; see also, Clabourne, 64 F.3d at 1378.

Counsel did present some mitigating evidence in his sentencing memorandum to the trial court, which included medical documents regarding Landrigan's juvenile alcoholism and use of drugs. A different and difficult situation confronted counsel at sentencing because Landrigan refused to have mitigating evidence presented to the court. At the outset, counsel explained to the court that he had two family members present, but that they had refused to testify on Landrigan's behalf. When the court asked why, counsel said:

> Basically it's at my client's wishes, Your Honor. I told him that in order to effectively represent him, especially concerning the fact that the State is seeking the death penalty, any and all mitigating factors, I was under a duty to disclose those factors to this Court for consideration regarding the sentencing. He is adamant he does not want any testimony from his family, specifically these two people that I have here, his mother, under subpoena, and as well as having flown in his ex-wife.
>
> I have advised him and I have advised him very strongly that I think it's very much against his interests to take that particular position.

Landrigan did not controvert that statement. In fact, the court decided to question him, and the following dialogue ensued:

> THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish him to bring any mitigating circumstances to my attention?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Do you know what that means?

THE DEFENDANT: Yeah.

THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?

THE DEFENDANT: Not as far as I'm concerned.

Landrigan's position could hardly have been more plain.

Courts have been somewhat cautious when dealing with an ineffectiveness claim based upon a client's demand that a certain course of action not be pursued, even if it might be to his benefit. In Strickland, 466 U.S. at 691, 104 S. Ct. at 2066, the Supreme Court did comment that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." That does not quite say that the defendant absolutely controls the situation. A similarly strong, yet hedged, statement was made by the Eleventh Circuit where it stated that "[w]hen a defendant preempts his attorney's strategy by insisting that a different defense be followed, no claim of ineffectiveness can be made," Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985), but went on to state that counsel investigated anyway and "did not blindly follow" his client's directions, id. at 890. We have taken a substantially similar approach. Thus, we have said that counsel was not ineffective when he failed to present mitigating evidence after his client directed him not to do so. Jeffries v. Blodgett, 5 F.3d 1180, 1197-98 (9th Cir. 1993). We did note, however, that counsel was prepared to present the evidence, and that the client had made a knowing and intelligent decision which precluded that. Id. at 1198. On the other hand, we have also stated that the lack of discovery and presentation of mitigating evidence could not be laid at counsel's feet where the client, "fired his attorneys precisely because they wanted to gather and introduce mitigating evidence on his behalf." Moran v. Godinez, 57 F.3d 690, 700 (9th Cir. 1994). And in a case where a defendant was "determined and unequivocal" in his decision to plead guilty and seek the death penalty, we opined that counsel's failure to offer additional advice and obtain a defense psychiatrist did not show ineffective assistance. Langford v. Day, 110 F.3d 1380, 1388 (9th Cir. 1997). More recently,

in a case where an attorney's decision regarding the presentation of certain evidence appeared to have been influenced by his client's wishes, we rather blandly opined that "[w]e believe that when the competence of a lawyer's tactical or strategic decision is being reviewed, the lawyer is entitled to an additional measure of deference if he acts in conformity with the client's wishes." Summerlin v. Stewart, No. 98-99002, slip op. 14361, 14400 (9th Cir. Oct. 12, 2001).

Perhaps the best synthesis of the above authorities is that it all depends. We do have to give deference to counsel's choices and determinations, but our ultimate decision will depend upon the facts and circumstances of the particular case before us. In the constellation of refusals to have mitigating evidence presented, however, this case is surely a bright star. No other case could illuminate the state of the client's mind and the nature of counsel's dilemma quite as brightly as this one. No flashes of insight could be more fulgurous than those which this record supplies.

Landrigan was not willing to merely express his opinions to counsel and, once having given those indications about his feelings, recede into comparative silence as counsel went about the business of conducting the proceeding. Quite the contrary; Landrigan took an actively aggressive posture, which ensured that counsel's attempts to place mitigating factors before the sentencing court would come a cropper. Each of counsel's feints in the mitigation direction brought a statement from Landrigan that painted an even bleaker picture and made matters even worse. But we will not merely resort to characterization; we will illustrate the situation with Landrigan's own words.

In an attempt to soften the effect of the fact that Landrigan had previously murdered his best friend, Greg Brown, counsel said that as Landrigan was walking away, Brown, a much larger man, rushed up and attacked him. Landrigan, who happened to be carrying a knife, defended himself and unfortunately killed Brown. A plausible story, but Landrigan would have none of it. His attorney got it all wrong. Rather, said he, "When we left the trailer, Greg went out of the trailer first. My wife was between us. I pulled my knife out, then I was the

one who pushed her aside and jumped him and stabbed him. He didn't grab me. I stabbed him." In other words, Landrigan had come from behind and acted in a murderous way. That was all there was to it.

Landrigan behaved similarly when counsel tried to envelop the assault on another prison inmate in a brume of self defense by suggesting that Landrigan had been threatened by the victim, who was a friend of Greg Brown and Greg's father. Landrigan responded thusly: "That wasn't Greg Brown's dad's friend or nothing like that. It was a guy I got in an argument with. I stabbed him 14 times. It was lucky he lived. But two weeks later they found him hung in his cell." Again, Landrigan had unnecessarily behaved in an extremely violent and murderous way toward another human being.

And when counsel tried to burnish Landrigan's benighted past by indicating that before Brown's murder, Landrigan, for at least one brief shining moment, was a "loving, caring husband," who had married and was taking care of his wife and her child by "working . . . at a golf course during the year-and-a-half" preceding the killing, Landrigan demurred. He explained: "Well, I wasn't just working. I was doing robberies supporting my family. We wasn't married. We wasn't married in Arizona. We lived in Oklahoma. I mean, you know, he's not getting the story straight. Why have him tell somebody else's story in the first fucking place?"

If that were not enough, Landrigan made the following presentation when the court asked if he would like to say anything in his own behalf:

> Yeah. I'd like to point out a few things about how I feel about the way this shit, this whole scenario went down. I think that it's pretty fucking ridiculous to let a fagot be the one to determine my fate, about how they come across in his defense, about I was supposedly fucking this dude. This never happened. I think the whole thing stinks. I think if you want to give me the death penalty, just bring it right on. I'm ready for it.

In effect, then, the record shows that counsel was able to get some mitigating evidence before the trial court. That court knew about Landrigan's past history of difficulty with drugs and alcohol, and did hear of the more benign explanations of Landrigan's behavior that we have outlined, although it also heard Landrigan's "corrections" of that information. In addition, it knew that had counsel been able to elicit evidence at the hearing, he would have sought a continuance to obtain expert evidence to further support the case for mitigation. The trial judge expressed no problem with that approach and, indeed, seemed amenable to it. Thus, it appears that the investigation was not necessarily over just because the sentencing hearing had commenced; it was, however, then truncated because of Landrigan's refusal to allow evidence to be presented at that hearing. Nevertheless, we do not hold that Landrigan's statements foreclose us from any further exploration of the circumstances. Rather, as we have done in other cases, we press on.

Landrigan argues that the record does not demonstrate that counsel's investigation of the case up to the point of the sentencing hearing itself had been very robust. We agree that from what we now have before us the investigation appears to have been rather asthenic. In another case, we might well say it was prejudicially asthenic. See Ainsworth v. Woodford, 268 F.3d 868, 878 (9th Cir. 2001) (emotional and mental history and other background has to be developed); Caro v. Calderon, 165 F.3d 1223, 1227 (9th Cir. 1999) (childhood background must be developed); Bean v. Calderon, 163 F.3d 1073, 1079 (9th Cir. 1998) (sufficient information must be given to experts); Clabourne, 64 F.3d at 1384 (mental history must be developed). Here, however, given Landrigan's apparently adamant insistence that mitigating evidence not be presented, it can reasonably be said that any deficiency in counsel's investigation could not have been prejudicial. On the other hand, it can also be said that if the investigation had been more thorough, Landrigan would have had more information from which he could make an intelligent decision about whether he wanted some mitigating evidence presented. Perhaps he would not have dealt with all other evidence in the way he dealt with the evidence that was presented; perhaps in some respect he would have tried to make the gloom surrounding him somewhat less inspissate.

What would he have done? For that we must again turn to Landrigan himself. Over four years after his sentencing, and even now, Landrigan's only personal declaration indicates that he would have cooperated in presentation of evidence on a single ground – genetic predisposition. As he put it "had trial counsel raised that aspect with him, [he] would have cooperated." If we take Landrigan at his word,[3] we must consider whether it is reasonably probable that use of that theory would have produced a different result. See Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. We must ask if its absence undermines our confidence in the outcome. See Smith, 140 F.3d at 1268. It does not.

That theory was rather exotic at the time, and still is.[4] It suggests that Landrigan's biological background made him what he is. Even had counsel been permitted by Landrigan to submit the genetic violence theory, given the other evidence before the sentencing court, we are satisfied that the result would not have been affected. We recognize that it is parlous indeed to predict what will affect a trial judge at sentencing. See Smith, 140 F.3d at 1270. Yet, there are times when we can confidently say that there would have been no difference in the result. This is one of those times.

The murder here, while vile enough, was not itself so vile and exceptional that "it was highly improbably that mitigating factors of any ordinary stripe would help." Id. at 1271; see also Gerlaugh v. Stewart, 129 F.3d 1027, 1042-43 (9th Cir. 1997); Bonin v. Calderon, 59 F.3d 815, 836 (9th Cir. 1995). However, as the Arizona courts pointed out, the murderer himself was exceptional; exceptionally unscrupulous; exceptionally lacking in regard for others; exceptionally lacking in morals.

It is highly doubtful that the sentencing court would have been

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[3] The state courts did not do so. The state post-conviction judge, who was the sentencing judge also, said "Again, the defendant's statements at sentencing belie his new-found sense of cooperation."

[4] See Mobley v. Head, No. 00-13980, 2001 WL 1172694, at *6 (11th Cir. Oct. 4, 2001) (not ineffective to present genetic disposition theory to jury); Turpin v. Mobley, 269 Ga. 635, 642-45, 502 S.E.2d 458, 465-67 (1998) (same).

moved by information that Landrigan was a remorseless,[5] violent killer because he was genetically programmed to be violent, as shown by the fact that he comes from a family of violent people, who are killers also. When faced with a similar claim about counsel's failure to present a family history of mental illness and violence, "including the fact that [the defendant's] father had murdered someone," the Illinois Supreme Court opined that there was no reasonable probability that the sentencer would not have awarded the death penalty anyway. People v. Franklin, 167 Ill. 2d 1, 26, 656 N.E.2d 750, 761 (1995). In fact, said the court, while the evidence "could have evoked compassion, . . . it could have also demonstrated defendant's potential for future dangerousness." Id. at 27, 656 N.E.2d at 761. It could have shown that he was "less deterrable or that society needed to be protected from him." Id. So it is here; although Landrigan's new evidence can be called mitigating in some slight sense, it would also have shown the court that it could anticipate that he would continue to be violent. He had already done that to a fare-thee-well. The prospect was chilling; before he was 30 years of age, Landrigan had murdered one man, repeatedly stabbed another one, escaped from prison, and within two months murdered still another man. As the Arizona Supreme Court so aptly put it when dealing with one of Landrigan's other claims, "[i]n his comments, defendant not only failed to show remorse or offer mitigating evidence, but he flaunted his menacing behavior." Landrigan I, 176 Ariz. at 8, 859 P.2d at 118. On this record, assuring the court that genetics made him the way he is could not have been very helpful.[6] There was no prejudice.

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[5] Even aside from what he said at the sentencing hearing, that Landrigan was remorseless can hardly be doubted. After he killed his best friend, Greg Brown, he told a sheriff: "Jim, I tried to kill the m---- f---. I don't take shit off nobody." Landrigan v. State, 700 P.2d 218, 219 (Okla. Crim. App. 1985). And after killing Dyer, he bragged to an ex-girlfriend that "he had 'killed a guy . . . with his hands' about a week before." Landrigan I, 176 Ariz. at 4, 859 P.2d at 114.

[6] In that regard, it should be noted that the new affidavits from family members and former friends do not tend to soften Landrigan's image. They, again, adumbrate a picture of a self-centered, dangerous individual, who would not learn from experience despite well-intentioned efforts.

In fine, the district court did not err when it refused to issue the writ on the basis of ineffective assistance of counsel.[7]

B. Other Contentions

Landrigan also mounts a number of other attacks upon his sentencing, none of which can enable him to prevail.

Landrigan asserts that the whole Arizona capital sentencing scheme is unconstitutional because a judge, rather than a jury, decides the sentencing issue. See Ariz. Rev. Stat. § 13-703. The Supreme Court has ruled otherwise. See Walton v. Arizona, 497 U.S. 639, 647-49, 110 S. Ct. 3047, 3054-55, 111 L. Ed. 2d 511 (1990). But, says Landrigan, Apprendi[8] undercuts Walton. Perhaps so, but we must leave it to the Court to overrule its own cases, if and when it decides to do so. See Rodriguez De Quijas v. Shearson Am. Express, Inc., 490 U.S. 477, 484, 109 S. Ct. 1917, 1921-22, 104 L. Ed. 2d 526 (1989); Hoffman v. Arave, 236 F.3d 523, 542 (9th Cir. 2001), cert. denied, ____ U.S. ____, 122 S. Ct. 323, ____ L. Ed. 2d ____, (2001). We need not, and do not, decide whether Apprendi applies at all in this habeas corpus proceeding. (Cf. Jones v. Smith, 231 F.3d 1227, 1238 (9th Cir. 2000) (Apprendi is a new rule which does not apply on collateral review of cases where elements omitted from state information.).

Landrigan next attacks his sentencing because once the state

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[7] We have not overlooked Landrigan's contentions that the district court improperly limited expansion of the record before it and denied an evidentiary hearing, but we see no merit in those contentions. The district court did allow significant expansion of the record. See Fed. R. Governing § 2254 Cases 7. What it allowed was sufficient, and Landrigan has not shown why additional evidence was relevant and would have affected the outcome. The district court did not abuse its discretion. See Flamer v. Delaware, 68 F.3d 710, 735 (3d Cir. 1995); McDougall v. Dixon, 921 F.2d 518, 532-33 (4th Cir. 1990); Watts v. United States, 841 F.2d 275, 277 (9th Cir. 1988) (per curiam). Similarly, the district court did not abuse its discretion when it determined that an evidentiary hearing was not required. See Fed. R. Governing § 2254 Cases 8; Shah v. United States, 878 F.2d 1156, 1160 (9th Cir. 1989); Watts, 841 F.2d at 277.

[8] Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d (2000).

trial court rejected his alleged intoxication and past history of drug use as a statutory mitigating factor, it did not go on to consider them as a nonstatutory mitigating factor. It was required to do so. See Arizona v. Schackart, 190 Ariz. 238, 252, 947 P.2d 315, 329 (1997); Arizona v. Jones, 185 Ariz. 471, 489-91, 917 P.2d 200, 218-20 (1996). Nevertheless, the Arizona Supreme Court could correct that error by reweighing the factors on appeal. It did so here. It said: "[w]e have independently reviewed the record to determine the presence or absence of aggravating and mitigating circumstances, and the propriety of the death penalty." Landrigan I, 176 Ariz. at 6, 859 P.2d at 116. It then concluded that, "[w]e also agree that the record does not present mitigating evidence sufficiently substantial to call for leniency." Id. at 7, 859 P.2d at 117. We have no reason to disbelieve those statements, and they suffice to obviate any error by the trial court. See Poland v. Stewart, 117 F.3d 1094, 1101 (9th Cir. 1997); Jeffers v. Lewis, 38 F.3d 411, 415 (9th Cir. 1994).[9]

Finally, Landrigan attacks his sentencing because in the presentence report the probation officer noted that Dyer's brother "felt the defendant deserved the death penalty," and a police detective believed "the defendant should get a maximum sentence." But, when the Supreme Court has rejected state attempts to require juries to consider family member comments on the proper penalty, that has been because "the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." Booth v. Md., 482 U.S. 496, 508, 107 S. Ct. 2529, 2536, 96 L. Ed. 2d 440 (1987), overruled on other grounds by Payne v. Tenn., 501 U.S. 808, 830, 111 S. Ct. 2597, 2611, 115 L. Ed. 2d 720 (1991). As the Court said, "Any decision to impose the death sentence must

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[9] At any rate, any error in failing to consider Landrigan's use of alcohol and drugs would have been inconsequential; it would have had no effect whatsoever on the outcome. See Bryson v. Ward, 187 F.3d 1193, 1205-06 (10th Cir. 1999) cert. denied, 529 U.S. 1058, 120 S. Ct. 1566, 146 L. Ed. 2d 469 (2000); Boyd v. French, 147 F.3d 319, 327 (4th Cir. 1998); Bolender v. Singletary, 16 F.3d 1547, 1566-67 (11th Cir. 1994); see also Clemons v. Mississippi, 494 U.S. 738, 753-54, 110 S. Ct. 1441, 1451, 108 L. Ed. 2d 725 (1990); Hitchcock v. Dugger, 481 U.S. 393, 399, 107 S. Ct. 1821, 1824, 95 L. Ed. 2d 347 (1987).

'be, and appear to be, based on reason rather than caprice or emotion.'" Id. (citation omitted). There is absolutely no reason to believe that the sentencing judge was influenced or otherwise diverted from her task by the opinion statements in question here. On this record, there is no reason to think that even possible, and the trial judge as much as said that she had not considered the information. Certainly, the fairness of the proceeding was not affected. Rather, "we must assume that the trial judge properly applied the law and considered only the evidence [she] knew to be admissible." Gretzler v. Stewart, 112 F.3d 992, 1003, 1009 (9th Cir. 1997).

CONCLUSION

When Landrigan was facing the possibility that the death penalty would be imposed upon him for the murder of his victim, he prevented the placement of some mitigating evidence before the sentencing judge. In fact, when counsel attempted to cast Landrigan's past history in a somewhat better light, Landrigan was quick to demolish those attempts and make sure that the court saw his past as drear indeed. He left the Arizona courts with the thought that he was minatory and remorseless. Landrigan I, 176 Ariz. at 8, 859 P.2d at 118. He does say that he would have allowed the presentation of genetic predisposition evidence, but it is not reasonably probable that the outcome would have been affected by that evidence. Perhaps Landrigan now regrets his stance, but we do not sit to palliate regrets. We sit to determine whether there has been error of constitutional magnitude. There has not been.

AFFIRMED.

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APPENDIX C

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CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
BY s/ _____DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

JEFFREY TIMOTHY LANDRIGAN,	)
	) NO.
	) CIV-96-2367-PHX-
	) ROS
Petitioner,	)
	) MEMORANDUM OF
v.	) DECISION AND ORDER
	)
TERRY STEWART, et al.,	)
	)
Respondents,	)
	)

Petitioner, Jeffrey Timothy Landrigan, filed a First Amended Petition for Writ of Habeas Corpus as well as a First Amendment to First Amended Petition for Writ of Habeas Corpus alleging that he is imprisoned and sentenced to death in violation of the United States Constitution. The First Amended Petition and amendment thereto raised seventeen claims. By Order dated June 10, 1998,the Court determined that Claims 1, 4, 6, 7, 8, 10, 11, and 13 were entitled to merits review and that all other claims were procedurally barred. Petitioner has also requested additional discovery and an evidentiary hearing. This Order addresses the merits of the remaining eight claims and Petitioner's requests for discovery and an evidentiary hearing. For the reasons stated herein the Court finds that Petitioner

is not entitled to federal habeas relief. The Court denies Petitioner's requests for additional discovery and an evidentiary hearing.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On June 28, 1990, a jury found Petitioner Jeffrey Landrigan guilty of burglary in the second degree, theft, and murder in the first degree. On October 25, 1990, the trial court sentenced Petitioner to 20 years on the burglary count, six months on the theft count, and death on the murder charge.

In State v. Landrigan, the court upheld Petitioner's convictions, summarizing the facts as follows:

> Evidence at trial established that the victim's body was found in his residence on December 15, 1989. According to the testimony of a friend ("Michael"), the victim had been a promiscuous homosexual who frequently tried to "pick up" men by flashing a wad of money. This would invariably occur after he got paid. The victim told Michael that he had recently met a person named "Jeff," with whom he wanted to have sex. The victim's physical description of Jeff was later found to closely approximate defendant.
>
> Michael received three phone calls from the victim on Wednesday, December 13, 1989. During the first, the victim said he had picked up Jeff, that they were at the apartment drinking beer, and he wanted to know whether Michael was coming over to "party." Approximately 15 minutes later, the victim called a second time and said that he was in the middle of sexual intercourse with Jeff. Shortly thereafter, the victim called to ask whether Michael could get Jeff a job. Jeff spoke with Michael about employment, and asked if he was going to come over. Michael said no. During one of these conversations, the victim indicated that he had picked up his paycheck that day.

The victim failed to show up for work the following day, and calls to him went unanswered. On Friday, a co-worker and two others went to the victim's apartment and found him dead. He was fully clothed, face down on his bed, with a pool of blood at his head. An electrical cord hung around his neck. There were facial lacerations and puncture wounds on the body. A half-eaten sandwich and a small screwdriver lay beside it. Blood smears were found in the kitchen and bathroom. Partial bloody shoeprints were on the tile floor.

Cause of death was ligature strangulation. Medical testimony at the presentence hearing indicated that the victim probably was strangled after being rendered unconscious from blows to the head with a blunt instrument.

Acquaintances testified that the apartment usually was neat. When the body was found, however, the apartment was in disarray. Drawers and closets were open; clothes and newspapers were strewn on the floor. The remnants of a Christmas present lay open and empty at the foot of the bed. In the kitchen area were two plates, two forks, a bread wrapper, luncheon meat, cheese wrappers, and an open jar of spoiled mayonnaise. A five-pound bag of sugar was spilled on the floor. A clear impression of the sole of a sneaker appeared in the sugar. Neither the paycheck nor its proceeds were located. Although the apartment had been ransacked, nothing else seemed to be missing.

When [Landrigan] first was questioned, he denied knowing the victim or ever having been to his apartment. When arrested, however, he was wearing a shirt that belonged to the victim. Seven fingerprints taken from the scene matched [Landrigan's]. The impression in the sugar matched his sneaker, down to a small cut on the sole. Tests also revealed that a small amount of blood had seeped into the sneaker. The blood matched that found on the shirt worn by the victim.

[Landrigan's] ex-girlfriend testified that she had three telephone conversations with him in December of 1989. During one of those, [Landrigan] told her that he was "getting along" in Phoenix by "robbing." [Landrigan] placed the last call to her from jail sometime around Christmas. He said that he had "killed a guy ... with his hands" about a week before.

The jury found [Landrigan] guilty of theft, second degree burglary, and felony murder for having caused the victim's death "in the course of and in furtherance of" the burglary. The jury also determined that [Landrigan] previously had been convicted in Oklahoma of assault and battery with a deadly weapon, second degree murder, and possession of marijuana. At the time of the Arizona incident, [Landrigan] was an escapee from an Oklahoma prison.

At the sentencing hearing, the trial judge found two statutory aggravating circumstances under A.R.S. § 13-703(F): that [Landrigan] was previously convicted of a felony involving the use or threat of violence on another person; and, that [Landrigan] committed the offense in expectation of the receipt of anything of pecuniary value. In making the latter finding, the trial judge noted that the victim's apartment had been ransacked, and it appeared the culprit was looking for something.

The trial judge found no statutory mitigating circumstances sufficient to call for leniency. As for non-statutory mitigating circumstances, she identified family love and absence of premeditation. She stated, however, that the mitigating factors did not outweigh the aggravating circumstances. [Landrigan] was sentenced to an aggravated term of 20 years on the burglary count, to six months in the county jail for theft and to death for murder.

State v. Landrigan, 176 Ariz. 1, 3-4, 859 P.2d 111, 113-114, cert. denied, 510 U.S. 927 (1993).

After the Arizona Supreme Court upheld Petitioner's conviction, he filed a Petition for Post-Conviction Relief pursuant to Rule 32, Ariz.R.Crim.P. The Rule 32 Court summarily dismissed the Petition and denied Petitioner's request for an evidentiary hearing on July 17, 1995. Petitioner filed a Petition for Review with the Arizona Supreme Court on December 5, 1995, which was denied on June 19, 1996. The Arizona Supreme Court issued a warrant for Petitioner's execution on October 29, 1996, fixing the date for execution as December 3, 1996.

On October 16, 1996, Petitioner filed his Preliminary Petition for Writ of Habeas Corpus in this Court and a finalized Petition on July 31, 1997.[1] Respondents filed an Answer to the finalized Petition on September 15, 1997. Petitioner subsequently moved to amend his Petition to include two additional claims on September 15, 1997, which the Court allowed. Respondents filed an Amended Answer.

On November 11, 1997, Petitioner filed a traverse. On December12, 1997, Petitioner filed a corrected traverse pursuant to an order of this Court. Respondents filed a Reply to the corrected traverse, and Petitioner filed a Sur-Reply.

On June 10, 1998, the Court entered its order regarding the procedural status of Petitioner's claims and ordered the parties to brief the merits of the remaining claims. Along with his memorandum on the merits, Petitioner filed a Motion to Expand the Record Under Rule 7 of the Rules Governing Section 2254 Cases on November 17, 1998. On March 5, 1999, Petitioner filed a Second Motion to Expand the Record.

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1. As with his Petition for Writ of Habeas Corpus, Petitioner has embellished his Amended Memorandum (File doc. 91) with a number of pictures of the Petitioner and his family. The photographs are not relevant in deciding the merit issues in this case, and the Court has therefore disregarded all photographs of the Petitioner and his family which appear in the Amended Memorandum.

Petitioner filed his Motion to Stay on August 25, 1999, asking the Court to stay these proceedings.

STANDARD OF REVIEW

This case is governed by the Anti-Terrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254, (AEDPA). Pursuant to § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Determination of factual issues by the state court "shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). The burden is on the Petitioner to rebut that presumption of correctness by clear and convincing evidence. Id.

"File doc." refers to the documents in this Court's file. "R.T." signifies the reporters' transcripts, "M.E" refers to the minute entries of the state court, and "R.O.A." refers to the state court record on appeal.

DISCUSSION

Claim 1: The death qualification of the jury by the trial court violated Petitioner's rights as guaranteed by the Sixth and Fourteenth Amendments.

"[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Witherspoon v. Illinois, 391 U.S. 510, 522 (1968). "A 'death-qualified' jury is one from which prospective jurors have been excluded for cause in light of their inability to set aside their views about the death penalty that 'would prevent or substantially impair the performance of [their] duties as [jurors] in accordance with [their] instructions and [their] oath.'" Buchanan v. Kentucky, 483 U.S. 402, 408 n.6 (1987) (internal quotes, cites, omitted).

Petitioner's "death qualification" claim is premised upon the presentation of death penalty questions to members of the venire by the trial court. The specific questions to which Petitioner objects are as follows:

> Are there any of you here that have strong feelings concerning the death penalty whereby you would tend to avoid finding a defendant guilty knowing that the possible punshment (sic) could be death?

* * *

Is there anyone here that has strong opinions concerning the death penalty, with your opinions being so strong it might influence the way you view the evidence in this case?

Is there anyone here who would prefer not to sit as a juror because of the nature of the charges?

Petitioner claims that it was prejudicial to inquire into the venire members' beliefs regarding the death penalty prior to the commencement of the trial, because jurors do not participate in the sentencing process and are instructed not to consider sentence during deliberation on questions of guilt.

Petitioner does not assert that any of the venire members were excluded from the jury based upon their answers to the trial court's qustions.[2] Of the seventeen jurors who expressed a preference not to sit on a jury in a capital case, none were excluded for cause. (R.T., 6/18/90, 12:10 p.m., at 59). Rather, three were peremptorily stricken by the prosecution, three were excused for medical reasons or planned vacations, four were excluded by peremptory challenges exercised by Petitioner's counsel, one actually served on the jury, and six were neither chosen nor stricken. (R.O.A., Photostated Instruments, Item 63; R.T. 6/18/90, 6:10 p.m., at 3-4).

Petitioner has failed to demonstrate that the trial court's questions to the venire were contrary to or constituted an unreasonable application of Witherspoon. The jury at Petitioner's trial was not "death-qualified," because no jurors were excluded for cause as a

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2. Petitioner claims that if prospective jurors have concerns about the death penalty, they "will remove themselves from the pool." (File doc. 91, p. 72). Petitioner erroneously imputes the authority of the trial court to exclude prospective jurors for cause to the jurors themselves. It is the trial court that excludes prospective jurors from the jury panel. Furthermore, the concern of a constitutional inquiry relating to exclusion of jurors focuses on impermissible state action, namely the improper exclusion of prospective jurors by the court or counsel.

result of the opinions they expressed about the death penalty.[3] The Court will therefore deny Petitioner's First Claim for Relief.

Claim 4: The failure by the trial court to offer the jury instruction on lesser included offenses violated Landrigan's rights under the Eighth and Fourteenth Amendments.

Petitioner claims the trial court erred in failing to instruct the jury on the noncapital offenses of second degree murder or manslaughter as lesser included offenses. The Court disagrees.

Petitioner was convicted of felony-murder. Under Arizona law, neither second-degree murder nor manslaughter are lesser included offense of felony-murder. State v. Dickens, 187 Ariz. 1, 23, 926 P.2d 468, 490 (Ariz. 1996), cert. denied, 522 U.S. 920 (1997) ("there are no lesser included offenses to felony murder"). Thus, the trial court was not required to instruct the jury as to those separate offenses. Hopkins v. Reeves, 524 U.S. 88, 118 S. Ct. 1895, 1900-01 (1998).

The rule in Beck v. Alabama, 447 U.S. 625 (1980) is not as broad as Petitioner suggests. Rather, Beck requires that where a lesser

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3. Petitioner does not appear to assert that it is improper to use peremptory challenges to exclude members of the venire from the jury based upon their views concerning the death penalty. There is no Supreme Court precedent on this issue, and the trial court's allowance of the use of peremptory challenges in this manner must therefore be upheld under § 2254(d)(1). Nevertheless, the Court notes that the use of peremptory challenges to exclude venire members for their opinions concerning the death penalty has generally been held proper. See, e.g., Burks v. Borg, 27 F.3d 1424, 1429 (9th Cir. 1994), cert. denied 513 U.S. 1160 (1995); Pitsonbarger v. Gramley, 141 F.3d 728, 735 (7th Cir.), cert. denied, ___ U.S. ___, 119 S. Ct. 448 (1998); Brown v. Dixon, 891 F.2d 490, 497 (4th Cir. 1989), cert. denied, 495 U.S. 953 (1990) ("state may use its peremptory challenges to purge a jury of veniremen not excludible for cause under Witherspoon"); State v. Detrich, 188 Ariz. 57, 66, 932 P.2d 1328, 1337, cert. denied, 522 U.S. 879 (1997).

included offense exists for the charged crime, and where there is evidence to support a verdict on the lesser included offense, the failure to permit a jury instruction on the lesser included offense is unconstitutional. Beck, 447 U.S. at 638.[4] It does not require that the trial court invent lesser included offenses to capital crimes *sua sponte* merely so that the jury may consider a noncapital alternative where no such alternative exists under state law. Hopkins, 524 U.S. at ___, 118 S. Ct. at 1901.

Moreover, the jury was instructed as to two alternative, noncapital offenses in this case: burglary and theft. The jury was thus not presented with an "all or nothing" choice to either convict Petitioner of a capital offense or acquit him altogether. See Schad, 501 U.S. at 646.

Petitioner further argues that the Court, in determining whether a jury instruction on second degree murder should have been given, should consider the fact that Petitioner was initially charged with second degree murder and that the state offered him a plea bargain to second degree murder. Petitioner has failed to cite any Supreme Court authority in support of this contention. In fact, the Hopkins decision suggests that if an instruction on second degree murder had been given despite the fact Petitioner was not being tried for second degree murder, and if Petitioner had been convicted of second degree murder and not felony-murder, such an instruction would have constituted reversible error. Hopkins, 524 U.S. at __, 118 S.Ct. at 1900. Moreover, in capital cases, plea negotiations in which the state offers a defendant to plead to a crime which does not result in a sentence of death are the only type of negotiations which are reasonably expected to be accepted by the defendant. Therefore, the state's offer to Petitioner to plead to second degree murder does not necessarily indicate that the state believed a death sentence to be

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4. Beck does not require that the jury be instructed on all available lesser included offenses. Schad v. Arizona, 501 U.S. 624, 646 (1991). Rather, it requires that where lesser included offenses are available, at least one must be given. 501 U.S. at 647-648.

inappropriate in this case. The Court finds that the state court's resolution of this claim is not contrary to or an unreasonable application of Beck or Hopkins, and thus will deny Petitioner's Fourth Claim for Relief.

Claim 6: Petitioner's rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments were violated as a result of the ineffective assistance of counsel that he received at the sentencing phase of the capital proceeding.

To prevail on a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). The performance inquiry is whether counsel's assistance was reasonable considering all the circumstances. 466 U.S. at 688-89. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." 466 U.S. at 689 (internal quotes omitted).

A petitioner must affirmatively prove prejudice. 466 U.S. at 693. The petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. "The assessment of prejudice should proceed on the assumption that the decision-maker is reasonably, conscientiously, and impartially applying the standards that govern the decision." 466 U.S. at 695.

A court need not address both components of the inquiry, or follow any particular order. If it is easier to dispose of an

ineffectiveness claim on the ground of lack of sufficient prejudice, without evaluating counsel's performance, that should be done. 466 U.S. at 697.

A. Conduct Subject to Merits Review

Prior to proceeding to a consideration of the merits of Claim 6, the Court must first clarify which allegations of ineffectiveness are properly subject to merits review by this Court. When the Court determines that a claim for ineffective assistance of counsel is subject to merits review, such a determination does not call into question all conduct of the Petitioner's counsel during trial and sentencing. Rather, the scope of such review is limited to the specific allegations of deficiency which were exhausted in the state court proceedings. Coleman v. Thompson, 501 U.S. 722, 731 (1991); Carriger v. Lewis, 971 F.2d 329, 333-334 (9th Cir. 1992), cert. denied, 507 U.S. 992 (1993).

To properly exhaust state remedies, the petitioner must "fairly present" his claims to the state's highest court in a procedurally appropriate manner. Castille v. Peoples, 489 U.S. 346, 351 (1989). A claim is fairly presented if the petitioner has described the operative facts and the legal theories on which his federal habeas claim is based. Anderson v. Harless, 459 U.S. 4, 6 (1982). If a claim includes new factual allegations which were not presented to the state court and which fundamentally alter the legal claim already considered by the state court, a claim may be rendered unexhausted. Vasquez v. Hillery, 474 U.S. 254, 260 (1986).

If there are claims which have not been raised previously in state court, the federal court must determine whether the petitioner has state court remedies currently available to him. If there are none, the claims are "technically" exhausted. Jackson v. Cupp. 693 F.2d 867, 869 (9th Cir. 1982) (citing Engle v. Isaac, 456 U.S. 107, 125 n. 28

(1982)). However, before the Court may review a technically exhausted claim on the merits, the petitioner must demonstrate legitimate cause and actual prejudice to excuse his failure to raise the claims in state court, or show that a fundamental miscarriage of justice would result. Ordinarily "cause" to excuse a default exists if a petitioner can demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Coleman, 501 U.S. at 753. "Prejudice" is actual harm resulting from the alleged constitutional error. Murray v. Carrier, 477 U.S. 478, 494 (1986). A fundamental miscarriage of justice would result if the petitioner is "innocent of the death sentence" or the petitioner is actually innocent of the capital crime.

1. Ineffective Assistance of Counsel Claims Raised in Amended Memorandum.

In his Amended Memorandum, Petitioner claims that his counsel failed to conduct a reasonable pretrial investigation and failed to present available mitigating evidence at sentencing. Specifically, Petitioner claims his counsel's conduct was deficient in the following respects:

(1) Counsel failed to contact other family members, including Petitioner's birth father, adoptive parents, and adoptive sister;

(2) Counsel failed to contact acquaintances and other officials who would have been willing to provide information;

(3) Counsel failed to present evidence indicating Petitioner suffers from organic brain damage;

(4) Counsel failed to present adequately mitigating psychiatric evidence concerning Petitioner's mental and emotional problems;

(5) Counsel failed to present adequate live testimonial evidence, expert and otherwise; and

(6) Counsel failed to present evidence by Petitioner's family and friends regarding Petitioner's personality, behavioral, and familial background.

(File doc. 91 at 81).

Petitioner states that had defense counsel contacted other family members, acquaintances, and officials, counsel would have obtained mitigating information relating to Petitioner's biological family, including any mental or physical disorders, dysfunctional lifestyles, Petitioner's biological mother's use of drugs and alcohol during her pregnancy, Petitioner's behavior as an infant, Petitioner's conduct as a child, and Petitioner's deportment as an adult. Id. Petitioner also states that many of those individuals were aware of Petitioner's drug use and other problems. Id.

Respondents urge that many of Petitioner's claims of deficient conduct on the part of defense counsel which Petitioner now raises in his Amended Memorandum are procedurally barred. Respondents assert that the Court's Order dated June 10, 1998, limited the merits review of Petitioner's sixth claim to the following questions:

(1) Was Petitioner's counsel ineffective for advising him not to cooperate with the probation officer?

(2) Was Petitioner's counsel ineffective for failing to explore additional grounds for arguing mitigation evidence; including the failure to contact Petitioner's biological father or adopted sister or failure to argue Petitioner's genetic propensity for violent conduct?

(File doc. 95 at 15). In order to clarify which of Petitioner's specific claims the Court held are available for merits review, the Court will review which specific claims it found were raised and exhausted in the state court.

2. Ineffective Assistance of Counsel Claims Raised and Exhausted in State Court.

Petitioner raised claims for ineffective assistance of counsel at two separate stages of the state court proceedings. On direct appeal, Petitioner claimed that his counsel's conduct was deficient in that counsel told the probation officer not to interview Petitioner for purposes of the aggravation/mitigation hearing. (Appellant's Opening Brief, p. 26). In his Petition for Post-Conviction Relief, Petitioner claimed that his counsel failed to contact Petitioner's biological father and adoptive sister, failed to present evidence that in an earlier conviction for second degree murder, Petitioner was acting in self-defense, and failed to explore additional grounds for arguing mitigation evidence. (R.O.A., Photostated Instruments, Item 137 at 13-14).

Petitioner contended that his adoptive sister would have verified that his adoptive mother was an alcoholic and that her alcoholism caused significant problems within the family unit which adversely affected Petitioner. Id. at 14. Petitioner also claimed that his adoptive sister would have provided additional information concerning family problems. Id.

Petitioner claimed that an investigation of his biological family would have revealed a long history of violent behavior and that his family's history of violence would have demonstrated his biological propensity for violence. Id. at 14-15. He further stated that his propensity for violence was greater in light of the fact that he was raised by an alcoholic mother in a dysfunctional home and the fact that his biological mother had used drugs and alcohol during her pregnancy. Id. at 15.

3. Ineffective Assistance of Counsel Claims Raised in First Amended Petition for Writ of Habeas Corpus.

In his First Amended Petition for Writ of Habeas Corpus, Petitioner's claims for ineffective assistance of counsel were raised in his sixth claim for relief. Petitioner alleged that his counsel's conduct was deficient in the following respects:

> (1) Counsel advised petitioner not to cooperate with the probation officer who prepared the presentence report;
>
> (2) Counsel allowed a mental health expert to examine Petitioner when counsel did not have the necessary documented social background information available for the expert to review before the examination;
>
> (3) Counsel would have identified mitigation evidence if counsel had reviewed Detective Chambers' report regarding Chambers' interview with Petitioner;
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> (4) Counsel would have identified mitigation evidence if counsel had reviewed Dr. Potts' psychiatric evaluation; and
>
> (5) Counsel otherwise failed to present mitigation evidence.

(First Amended Petition pp. 28-29).

4. Claims Which Are Available for Merits Review

Based on the foregoing, the Court clarifies that the following claims of ineffective assistance of counsel are properly before this Court for review on the merits:

(1) Counsel's instruction to probation officer not to interview Petitioner in preparation for the aggravation/mitigation hearing;

(2) Counsel's failure to contact Petitioner's biological father and adoptive sister to aid counsel's investigation concerning evidence of mitigation;

(3) Counsel's failure to present mitigating evidence that Petitioner's earlier conviction for second degree murder was the result of a homicide in which Petitioner was acting in self-defense;

(4) Counsel's failure to investigate and present other evidence of mitigation, including the failure to present evidence of the following:

(a) The alcoholism of Petitioner's adoptive mother;

(b) His adoptive family's dysfunctional nature;

(c) His biological family's violent history; and

(d) His biological mother's use of drugs and alcohol during her pregnancy.

The remaining allegations of ineffective assistance of counsel were not fairly presented to the state court. If Petitioner were to return to state court, those allegations would be precluded pursuant to Ariz.R.Crim.P. 32.2(a)(3), and they are technically exhausted. Petitioner has failed to demonstrate cause or prejudice for his failure to present these allegations to the state court, nor has he demonstrated that a fundamental miscarriage of justice will occur if the Court does not review those allegations. The Court therefore limits its review of Petitioner's Sixth Claim for Relief to the four enumerated allegations, including subparts (a) through (d) of allegation four, listed above.

B. Review on the Merits

1. Factual Background

At the presentence hearing on October 25, 1990, Petitioner declined to present evidence of mitigation. Petitioner's defense counsel explained to the sentencing judge that Petitioner did not want to present mitigating evidence, stating as follows:

> MR. FARRELL: . . . Mr. Landrigan has made it clear to me — Jeffrey, the defendant — that he does not wish anyone from his family to testify on his behalf today.
>
> * * *
>
> MR. FARRELL: Basically it's at my client's wishes, Your Honor. I told him that in order to effectively represent him, especially concerning the fact that the State is seeking the death penalty, any and all mitigating factors, I was under a duty to disclose those factors to this Court for consideration regarding the sentencing. He is adamant he does not want any testimony from his family, specifically these two people that I have here, his mother, under subpoena, and as well as having flown in his ex-wife.
>
> I have advised him and I have advised him very strongly that I think it's very much against his interests to take that particular position. I have also advised both the witnesses I could have them sworn in and ask them questions, but they are under an obligation to do what they feel is right, Your Honor. They are looking after Jeff's interest.
>
> I'm coming from the position that I have to bring certain evidence before this Court. I'm at a loss. I don't know what this Court wishes to do.

(R.T. 10/25/90 at 3-4). The court then engaged in the following colloquy with Petitioner:

THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish for him to bring any mitigating circumstances to my attention?

THE DEFENDANT: Yeah.

THE COURT: Do you know what that means?

THE DEFENDANT: Yeah.

THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?

THE DEFENDANT: Not as far as I'm concerned.

(R.T. 10/25/90 at 4). The court then proceeded with the hearing.

Petitioner's counsel intended to call Petitioner's ex-wife, Sandra Landrigan, to testify as to mitigating circumstances. Sandra Landrigan indicated that she would not testify because Petitioner had asked her not to do so. (R.T. 10/25/90 at 5). Petitioner's counsel proffered that he would have elicited testimony from Sandra Landrigan relating to her relationship with Petitioner, his history of substance abuse, his child, what type of father and spouse he was, that he was a responsible person, and that he was a loving and caring husband. (R.T. 10/25/90 at 6-7). Petitioner's counsel also expected Sandra Landrigan to testify about the details of Petitioner's previous second degree murder conviction, including the fact that the aggression was initiated by the victim and the Petitioner was defending himself. (R.T. 10/25/90 at 8-10.) Petitioner then contradicted this proffered version of the facts relating to the prior murder conviction by claiming that the Petitioner, not the victim, had been the initial aggressor. (R.T. 10/25/90 at 11-12).

Petitioner's counsel also intended to call Petitioner's biological mother, Virginia Gipson, to testify as to mitigating evidence. (R.T. 10/25/90 at 2-3). Petitioner's counsel proffered that he would have

elicited testimony from Virginia Gipson relating to factors which might have affected her pregnancy, including her use of drugs during the pregnancy. (R.T. 10/25/90 at 13-14). Petitioner's counsel then stated that he planned to substantiate Ms. Gipson's testimony with expert testimony regarding the neurological and antisocial effects of drug usage on an unborn fetus. (R.T. 10/25/90 at 14-15).

Later in the hearing, the Court asked Petitioner if he had anything to say on his own behalf. (R.T. 10/25/90 at 21). Petitioner responded as follows:

> THE DEFENDANT: Yeah. I'd like to point out a few things about how I feel about the way this shit, this whole scenario went down. I think that it's pretty fucking ridiculous to let a fagot be the one to determine my fate, about how they come across in his defense, about I was supposedly fucking this dude. This never happened. I think the whole thing stinks. I think if you want to give me the death penalty, just bring it right on. I'm ready for it.

(R.T. 10/25/90 at 21-22).

2. Ineffective Assistance of Counsel — Improper Advice to Probation Officer

On direct appeal, Petitioner claimed that his defense counsel was ineffective for improperly instructing the probation officer not to interview Petitioner. (Appellant's Opening Brief at 26-27). The Arizona Supreme Court held that the defense counsel's instruction to the probation officer "was clearly within the wide range of professionally competent assistance, given defendant's stated desire not to have mitigating evidence presented in his behalf, and his tendency to volunteer damaging statements like those made to the trial judge at the hearing." State v. Landrigan, 176 Ariz. at 8, 859 P.2d at 118. In this Court, Petitioner has not argued his claim that the instruction to the probation officer constituted ineffective assistance

of counsel in either his memorandum or reply on the merits. This constitutes abandonment of this claim as a source of ineffective assistance of counsel. See United States v. Vought, 69 F.3d 1498, 1501 (9th Cir. 1995) (failure to address claim in appellate brief is abandonment of claim).

3. Ineffective Assistance of Counsel — Failure to Discover and Present Mitigation Evidence

In his Petition for Post-Conviction Relief, Petitioner claimed that his counsel was ineffective regarding his proffer of mitigation evidence at the presentence hearing and his failure to investigate and present additional mitigation evidence on Petitioner's behalf. In their response, Respondents argued that Petitioner waived any claim of ineffective assistance of counsel by expressly instructing his defense counsel not to present mitigating evidence.[5]

(R.O.A., Photostated Instruments, Item 138 at 5). The Rule 32 court found and ruled as follows:

> Since defendant instructed his attorney not to present any evidence at the sentencing hearing, it is difficult to comprehend how defendant can claim counsel should have presented other evidence at sentencing. . . . Since the defendant instructed his attorney not to bring any mitigation to the attention of the court, he cannot now claim counsel was ineffective because he did not "explore additional grounds for arguing mitigation evidence".

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5. It is important to note that the sentencing judge did consider the defense attorney's proffer and accepted it as true for purposes of sentencing. (R.T. 10/25/90 at 30). However, the proffer was limited to the two witnesses whom the defense attorney intended to examine if Petitioner had not objected. The proffer did not include any other mitigating evidence which may have been discovered through additional investigation.

(M.E. of 7/17/95 at 3-4). The Rule 32 court impliedly ruled that Petitioner's trial counsel behaved reasonably by failing to introduce additional mitigation evidence given Petitioner's instruction to counsel. The initial question presented is whether the Rule 32 court's implicit determination that Petitioner's trial counsel acted reasonably was "an unreasonable application of controlling Supreme Court precedent" or "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" such that Petitioner is entitled to habeas relief. 28 U.S.C. §§ 2254(d)(1)&(2).

The Court finds that even if the Rule 32 court's determination that Petitioner's counsel acted reasonably involved an unreasonable application of controlling Supreme Court precedent or was an unreasonable determination of facts in light of the evidence presented, Petitioner has failed to demonstrate he was prejudiced by his trial counsel's alleged failure to discover and present mitigation evidence. The Court expanded the record to include numerous affidavits and other evidence which Petitioner claims to be mitigating, including, inter alia, evidence of Petitioner's troubled background, his history of drug and alcohol abuse, and his family's history of criminal behavior. The Court has reviewed the expanded record *de novo* and concludes that Petitioner has failed to demonstrate a reasonable probability that the result of the proceeding would have been different if his trial counsel had discovered and presented the evidence he claims should have been discovered and presented in mitigation. See Strickland, 466 U.S at 694. He has failed to show that there is a "reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 695. The Court will thus deny Petitioner's request for relief on Claim 6.

Claim 7: Petitioner's rights to have a jury determine the existence of mitigating circumstances and take part in the sentencing decision, as guaranteed by

the Sixth and Fourteenth Amendments.

Petitioner claims his rights under the Sixth and Fourteenth Amendments were violated in that the trial judge, rather than the jury, made the factual determinations requisite to the imposition of his death sentence as well as the ultimate determination of sentence. Petitioner assserts that under the circumstances presented in this case, the Court should disregard the ruling in Walton v. Arizona, 497 U.S. 639 (1990), which upheld the Arizona capital punishment sentencing scheme. The Supreme Court in Walton specifically held that sentencing by the judge rather than the jury in capital cases is not unconstitutional, and "'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." 497 U.S. at 647-48, citing Hildwin v. Florida, 490 U.S. 638, 640-641 (1989) (per curiam). The Court declines Petitioner's invitation to disturb the clearly established law of Walton, and thus will deny Petitioner's Seventh Claim for Relief.

Petitioner cites Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215 (1999), and urges this Court to revisit and "reexamine Walton." It is true, as Petitioner states, that the Jones decision questions the constitutional soundness of the Walton decision.[6] Justice Stevens, in his concurrence, and the Chief Justice, Justices Kennedy, O'Connor, and Breyer, in their dissent, expressly noted the doubt case on the Walton opinion by the Jones decision. 526 U.S. at ___, 119 S.Ct. at 1229, 1238. Justice Kennedy further noted, however, that although the Walton decision should be reconsidered, it was not necessary to do so in joining in the opinion of the Court. Id., 526 U.S. at __, 119 S.Ct. at 1229.

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6. It should be noted that the facts in Jones dealt with the statutory interpretation of a federal carjacking statute and did not involve any interpretation of capital sentencing under federal habeas review.

Without reaching the issue whether Petitioner's assertion is Teague-barred, the Court finds that it does not have the authority to overrule the clearly established Supreme Court law as set forth in Walton. The reconsideration of Walton was not required in Jones, nor did a thorough reconsideration of Walton take place. The Walton decision has not been overruled by the Supreme Court, and unless it is, Walton is the clearly established Supreme Court law for purposes of habeas review under § 2254(d).

Claim 8: The trial court's failure to consider evidence of mitigation offered at trial and the Arizona Supreme Court's failure to consider evidence of mitigation in its independent review violated Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

In his Eighth Claim for Relief, Petitioner claims:

> The trial court's failure to consider evidence of mitigation offered at trial and the Arizona Supreme Court's failure to consider evidence of mitigation in its independent review violated Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

In a capital case, a sentencing judge may not refuse to consider, as a matter of law, any relevant mitigating evidence. Eddings v. Oklahoma, 455 U.S. 104, 113-114 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion). Nor may the court confine its consideration of mitigating evidence to the mitigating factors listed in a state statute. Hitchcock v. Dugger, 481 U.S. 393, 399 (1987). The primary concern is "that the sentencing decision be based on the facts and circumstances of the defendant, his background, and his crime." Clemons v. Mississippi, 494 U.S. 738, 748 (1990). The sentencing judge "must consider all relevant mitigating evidence and weigh it

against the evidence of the aggravating circumstances." Eddings, 455 U.S. at 117. The sentencing judge "may determine the weight to be given relevant mitigating evidence," but the judge may not give it no weight by excluding such evidence from the judge's consideration." Id. at 115. However, "the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense" continues to exist. Lockett, 438 U.S. at 604, n. 12.

Ninth Circuit case law is instructive concerning what constitutes a reasonable application of Eddings for purposes of the AEDPA. When considering mitigation evidence, the sentencing judge "is free to assess how much weight to assign to such evidence[.]" Ortiz v. Stewart, 149 F.3d 923, 943 (9th Cir. 1998), cert. denied, __ U.S. __, 119 S.Ct. 1777 (1999). The trial court is not required to "itemize and discuss every piece of evidence offered in mitigation." Jeffers v. Lewis, 38 F.3d 411, 418 (9th Cir. 1994) (en banc), cert. denied, 514 U.S. 1071 (1995). It must be simply be clear that the court considered all mitigating evidence which was offered. Id. A finding that there are "no mitigating circumstances" does not violate the Constitution. Ortiz, 149 F.3d at 943. "It is sufficient that a sentencing court state that it found no mitigating circumstances that outweigh the aggravating circumstances." Poland v. Stewart, 117 F.3d 1094, 1101 (9th Cir. 1997), cert. denied, __ U.S. __, 118 S.Ct. 1533 (1998). In Ortiz, 149 F.3d at 943, the trial court found that "after considering all of these factors there are no mitigating circumstances sufficiently substantial to call for leniency." (internal quotes omitted). There was no refusal to consider mitigating evidence by the trial court. Id. Rather, the court considered the mitigating evidence "and found it inadequate to justify leniency." Id.

State appellate courts are not required to reweigh the mitigating and aggravating circumstances when errors have occurred in a capital sentencing proceeding. Clemons, 494 U.S. at 754. Nevertheless, several states, otherwise known as "weighing states," have chosen this method for reviewing capital sentencings. "[I]n a 'weighing' state such as Arizona, when a trial court bases its decision to impose a

death sentence on both valid and invalid aggravating factors, a state appellate court can affirm the sentence only after performing a harmless-error review, or reweighing the mitigating evidence against the remaining valid aggravating factors." Jeffers, 38 F.3d at 414 (citing Clemons, 494 U.S. at 741.). Upon review, it must be determined that the state appellate court actually reweighed the mitigating and aggravating circumstances. Richmond v. Lewis, 506 U.S. 40, 48 (1992). A mere recitation by the appellate court that it has weighed the mitigating circumstances against the aggravating circumstances is insufficient. Jeffers, 38 F.3d at 422 (citing Clemons, 494 U.S. at 744). If the appellate court applied the proper standard of review, then Petitioner will not be entitled to habeas relief on this claim. Clemons, 494 U.S. at 748-749.

A. The trial court's alleged failure to consider mitigation evidence.

Petitioner claims that the sentencing court erred by refusing to consider a number of different mitigating factors. He claims that the sentencing court "simply dismissed the remaining proffered statements concerning evidence of mitigation. . . . limit[ing] the proffered mitigation to Landrigan's mental state at the time of the crime." Id.

Petitioner's assertion appears, in part, to be correct. To the extent Petitioner argues that the trial court failed to consider evidence of Petitioner's "respectful demeanor during trial" or his difficult family history, the Court disagrees. The trial court expressly found that Petitioner did not have a difficult family history. (M.E. of 10/25/90 at 4-5). In addition, the trial court stated that "although the defendant may have been respectful and proper during trial, his demeanor at sentencing was not," and the trial court determined that there was no mitigation evidence of "respectful demeanor." Id. The Court will not disturb these factual determinations, which are supported by the record and which Petitioner has failed to rebut by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). However, to the extent Petitioner argues that the trial court failed to consider evidence of

Petitioner's intoxication at the time of the offense[7] or his history of drug and alcohol abuse as nonstatutory mitigation circumstances, the Court agrees. Respondents admitted as much on direct appeal, where they stated:

> [Petitioner] proffered his purported alcohol and drug abuse solely in the context of A.R.S. § 13-703(G)(1), claiming that it impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. . . .[Petitioner] did not proffer his purported alcohol and drug abuse as a nonstatutory -- character -- mitigating circumstance. As previously noted, the eighth and fourteenth amendments prohibit only the preclusion or refusal to consider proffered mitigation. . . . Since [Petitioner] did not proffer his purported alcohol and drug abuse as nonstatutory "character" mitigation, the trial court did not improperly "restrict" consideration of the proffered mitigation.

(Appellee's Answering Brief at 40).[8]

Petitioner proffered mitigating evidence concerning his drug and alcohol use. In his Sentencing Memorandum Concerning Mitigation ARS § 13-703(G)[9], Petitioner raised, inter alia, "the following aspects

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7. The trial court's failure to consider Petitioner's intoxication at the time of the offense was cured by the Arizona Supreme Court's consideration of that evidence. See infra.

8. Respondents have since argued that the trial court "discussed and considered *every* proffered mitigating circumstance." (File doc. 95 at 24). They do not contend, however, that the trial court weighed all mitigating circumstances against the aggravating circumstances, as was required.

9. A.R.S. § 13-703(G) provides in pertinent part:

> Mitigating circumstances shall be any factors proffered by the defendant or the state which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record and any of the circumstances of the

(continued...)

of his character, propensities, record, and the following circumstances of the offense, as mitigating evidence sufficiently substantial to call for leniency:"

(1) Petitioner's ingestion of drugs and alcohol prior to the murder; and

(2) Petitioner's long history of drug and alcohol abuse.

(R.O.A., Photostated Instruments, Item 91). Specifically, Petitioner proffered the following mitigating circumstances relating to drug and alcohol use:

(1) Petitioner and the victim were drinking alcohol, smoking marijuana, and taking drugs at the victim's apartment;

(2) Petitioner has a long history of substance abuse concerning alcohol and drugs; and

(3) Petitioner's intoxication on the night the victim was killed substantially impaired his ability to appreciate the wrongfulness of his conduct.

(R.O.A., Photostated Instruments, Item 91 at 6-8). In addition, Petitioner attached two exhibits to his Sentencing Memorandum which demonstrated that Petitioner started drinking at the age of thirteen and was admitted at age seventeen to an Alcohol Treatment Program at St. Johns Hospital in Tulsa, Oklahoma. Id. at Exhibit B. At the presentence hearing, Petitioner's attorney proffered that Petitioner

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9. (...continued)
offense, including but not limited to the following:

4. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution. . . .

met his wife at a substance abuse rehabilitation center. (R.T. of 10/25/90 at 6). The Presentence Investigation prepared by the probation officer also demonstrated that Petitioner had a history of drug and alcohol abuse:

> The defendant apparently has a history of alcohol and amphetamine abuse. The defendant's Oklahoma Department of Corrections records also show that he had a number of disciplinary actions for possession of a controlled substance while in custody.

(R.O.A., Photostated Instruments, Item 95 at 5).

When weighing the mitigating circumstances against the aggravating circumstances at the presentence hearing, the trial court stated as follows:

> After weighing and considering the aggravating circumstances that the defendant had two prior felony convictions involving the use of violence on another person and committed the offense with the expectation of pecuniary gain, and considering the mitigating circumstances of love of family, love of his family for him, . . . and no premeditation . . . I find that the mitigating circumstances do not outweigh the aggravating circumstances.

(R.T. of 10/25/90 at 33). In weighing the mitigating circumstances against the aggravating circumstances during the presentence hearing, the trial court did not consider mitigating circumstances relating to Petitioner's intoxication at the time of the offense or his history of drug and/or alcohol abuse. The trial court then sentenced Petitioner to death. Id. at 34.

At the hearing, the trial court concluded that Petitioner's proffered evidence of his drug or alcohol intoxication at the time of the offense did not satisfy the requirements of A.R.S. § 13-703(G)(1). The trial court stated as follows:

> The defendant's state of intoxication has been alleged as a mitigating circumstances (sic) under element (G)(1), that the defendant's capacity to appreciate the wrongfulness of his conduct and his ability to conform his conduct to the requirements of law was (sic) significantly impaired, but not so impaired as to constitute a defense to prosecution. In the sentencing memorandum it is argued that evidence was presented at trial that the defendant drank quite a bit, smoked marijuana and did drugs. I do not recall any testimony about drinking or drug use.[10] I do recall some evidence regarding the use of marijuana. However, no evidence has been presented to show that the apparent use of marijuana affected the defendant's capacity to appreciate the wrongfulness of his conduct or impaired his ability to conform his conduct to the requirements of law. Additionally, drug or alcohol intoxication, in and of itself, is not a mitigating circumstance.

(R.T. of 10/25/90 at 28-29).

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10. In fact, there was testimony regarding drinking and drug use prior to the murder, which the Arizona Supreme Court recognized. A witness at trial testified concerning a telephone conversation he had with the victim on the evening of the murder:

> A We discussed he had gone down to pick up some beer and picked up a guy named Jeff and brought Jeff back to the apartment so they could drink some beer and smoke some joints. . . .
>
> Q What did he say about Jeff?
>
> A That he had picked Jeff up at a Burger King and that he was the same Jeff that he had told me about prior and they were getting drunk, or they were drinking and wanted to know if I was going to come over.

(R.T. of 6/19/90 at 49). The same witness testified earlier that the victim was a drinker and drank "a 12-pack a day, five days a week," and every time the victim would start drinking beer he would get drunk. (Id. at 46). He further testified that the victim was intoxicated at the time of the phone call. (Id. at 66). Police found a bong in the apartment and surmised it was used to smoke marijuana. (Id. at 110).

The trial court also entered a written sentencing order. (M.E. of 10/25/90). In addition to finding that two aggravating circumstances were proven beyond a reasonable doubt, the trial court stated:

> The defendant alleged A.R.S. § 13-703(G)(1) as a mitigating circumstance. Assuming, intoxication and/or drug use (although not demonstrated) and defendant's predisposition to addiction based upon his mother's use of drugs during pregnancy, the defendant has failed to show by even slight evidence that any or all of the factors diminished or to the slightest degree diminished the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of the law. . . .

Id. at 4-5.

The trial court's determination that Petitioner's use of drugs or alcohol did not impair Petitioner's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law is a finding of fact which the Court will not disturb. See 28 U.S.C. § 2254(e)(1). However, the trial court's determination that such evidence was not mitigating evidence under § 13-703(G)(1) did not excuse the trial court from considering that evidence as non-statutory mitigation when weighing the mitigating and aggravating circumstances. See Smith v. Stewart, 140 F.3d 1263, 1271 (9th Cir.), cert. denied, __ U.S. __, 119 S.Ct. 336 (198) (long use of drugs could have mitigating effect and must be considered as nonstatutory mitigating factor even if it does not satisfy § 13-703(G)(1).

The trial court concluded that "drug or alcohol intoxication, in and of itself, is not a mitigating circumstance." Petitioner's intoxication by drugs or alcohol, if any, at the time of the offense is relevant evidence bearing on the circumstances of the offense and should have been considered at mitigating evidence. Cf. Lockett, supra; A.R.S. § 13-703(G). In addition, Petitioner's history of drug or alcohol abuse is relevant mitigating character evidence. Smith v. Stewart,

140 F.3d at 1271; cf. Eddings, supra; Lockett, supra. The trial court was entitled to give as little or as much weight to such evidence as it found appropriate, but it was not entitled to exclude that evidence from consideration altogether. The trial court's failure to consider Petitioner's intoxication by drugs and/or alcohol at the time of the offense, and its failure to consider Petitioner's history of drug and/or alcohol abuse, was contrary to the clearly established Supreme Court law of Eddings, Lockett, and Hitchcock, supra.

B. Arizona Supreme Court's alleged failure to conduct proper independent review

The fact that the trial court failed to consider relevant mitigation evidence does not necessarily indicate that Petitioner is entitled to habeas relief. Because the Arizona Supreme Court conducts an independent review of capital sentencing determinations, any errors committed by the sentencing judge can be cured on direct appeal.

On direct appeal, the Arizona Supreme Court stated as follows:

> We have independently reviewed the record to determine the presence or absence of aggravating and mitigating circumstances, and the propriety of the death penalty. State v. Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976). Defendant claims the record does not support a finding that the murder was committed with the expectation of the receipt of anything of pecuniary value, pursuant to A.R.S. § 13-703(F)(5).
>
> We disagree. Not only is the actual receipt of money or valuables not required to find the expectation of pecuniary gain, State v. LaGrand, 153 Ariz. 21, 36, 734 P.2d 563, 576 (1987), but here defendant was convicted of theft and burglary on evidence we have deemed sufficient. Defendant admitted he was getting money by robbing. The victim, who was pursuing defendant as a sexual partner, was an obvious target. The apartment was ransacked. The killing hardly appears to

have been unexpected or accidental. See State v. Nash, 143 Ariz. 392, 405, 694 P.2d 222, 235 (1985) (unexpected or accidental death during course of or flight from robbery will not support aggravating circumstance of pecuniary gain). Physical and testimonial evidence supports the finding that pecuniary consideration was a cause, not merely a result, of the murder. LaGrand, 153 Ariz. at 35, 734 P.2d at 577 ("When the defendant comes to rob, the defendant expects pecuniary gain and this desire infects all other conduct of the defendant").

> The record also supports the finding of a second aggravating circumstance, that defendant previously was convicted of a felony involving the use or threat of violence on another person under A.R.S. S 13-703(F)(2). See Okla.Stat. tit. 21, SS 641, 642, 645 (1971) (assault and battery with a dangerous weapon). Defendant on appeal does not contest this finding. The state produced certified public records from Oklahoma, and its expert matched defendant's fingerprints with those on the records.
>
> We also agree that the record does not present mitigating evidence sufficiently substantial to call for leniency. The trial judge properly rejected defendant's suggestion that intoxication was a mitigating circumstance under A.R.S. S 13-703(G)(1). The only evidence on this subject was testimony from the friend who said the victim called and told him that he and Jeff were drinking beer. There was no evidence that defendant was impaired, that he did not have the capacity to appreciate the wrongfulness of his conduct, or that he could not conform his conduct to the requirements of the law.

State v. Landrigan, 176 Ariz. at 6-7, 859 P.2d at 116-117.

The Arizona Supreme Court's recitation that it "independently reviewed the record to determine the presence or absence of aggravating and mitigating circumstances, and the propriety of the death penalty" is pertinent, but not dispositive. Although it is clear

that the Arizona Supreme Court independently determined the existence of two aggravating circumstances, it does not appear that it considered the proffered mitigating evidence as nonstatutory mitigating evidence. Rather, it agreed with the sentencing court that Petitioner's intoxication at the time of the incident was not statutory mitigating evidence under A.R.S. § 13-703(G) "sufficiently substantial to call for leniency." Id. at 7, 859 P.2d at 117. The Arizona Supreme Court did not address the argument raised in Petitioner's direct appeal brief that the sentencing court improperly failed to consider and weigh evidence of mitigation, nor did it address whether Petitioner's history of drug and alcohol abuse should have been considered as nonstatutory mitigating factors. Instead, it appears the Arizona Supreme Court accepted the argument set forth in the Appellee's Answering Brief that "[s]ince appellant did not proffer his purported alcohol and drug abuse as nonstatutory 'character' mitigation, the trial court did not improperly 'restrict' consideration of the proffered mitigation." (Appellee's Answering Brief at 40). The Court finds that the Arizona Supreme Court did not "[conduct] appellate reweighing as [the Court] understand[s] the concept." Clemons, 494 U.S. at 752.

C. Remedy

The question becomes one of remedy. The appropriate standard of review is harmless error review. See Hitchcock v. Dugger, 481 U.S. 393, 1824 (1987); Bryson v. Ward, 187 F.3d 1193, 1205 (10th Cir. 1999); Boyd v. French, 147 F.3d 319, 327 (4th Cir. 1998), cert. denied, ___ U.S. ___, 119 S.Ct. 1050 (1999); Sweet v. Delo, 125 F.3d 1144, 1158 (8th Cir. 1997), cert. denied, ___ U.S. ___, 118 S. Ct. 1197 (1998); Demps v. Dugger, 874 F.2d 1385, 1389-90 (11th Cir. 1989), cert. denied, 494 U.S. 1090 (1990) (pre-Brecht). An error is not harmless if it "had substantial and injurious effect or influence in determining" the sentence. Brecht v. Abrahmson, 507 U.S. 619, 623 (1993).

'"Review for harmless error requires not only an evaluation of the remaining incriminating evidence in the record, but also the most

perceptive reflections as to the probabilities of the effect of error on a reasonable trier of fact'" United States v. Garibay, 143 F.3d 534, 539 (9th Cir. 1998) (citing United States v. Harrison, 34 F.3d 886, 892 (9th Cir. 1994)). "Highly significant is the nature of the information and its connection to the case." Mach v. Stewart, 137 F.3d 630, 634 (9th Cir. 1998). "Where the record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of an error, the error is not harmless and relief should be granted." Jeffries v. Wood, 114 F.3d 1484, 1489 (9th Cir.), cert. denied, ___ U.S. ___, 118 S.Ct. 586 (1997). "Petitioner must establish that there is a reasonable probability that life imprisonment would have been imposed had the error(s) not occurred." Davis v. Singletary, 853 F.Supp. 1492, 1581 (M.D.Fla. 1994), aff'd, 119 F.3d 1471 (1997), cert. denied, ___ U.S. ___, 118 S.Ct. 1848 (1998). "Nonstatutory mitigating evidence not considered by the [sentencer] affects the [sentencer's] recommendation if it amounts to a significant mitigating circumstance." Jackson v. Dugger, 931 F.2d 712, 716 (11th Cir.), cert. denied, 502 U.S. 973 (1991) (cites omitted).

The Court finds that the failure of the sentencing judge and the Arizona Supreme Court to consider Petitioner's alleged history of drug and alcohol abuse as a mitigating circumstance did not have a substantial and injurious effect on the sentence. The Court has reviewed the evidence in the expanded record attesting to Petitioner's history of drug and alcohol abuse, including numerous declarations by family, friends, and neighbors. For example, the Court has considered the declaration by Petitioner's adoptive sister, Shannon Sumter, who states that Petitioner started "doing drugs when he was pretty young," that Petitioner's "behavior was exaggerated by his drug use," and that he came close to death many times because of drug overdoses and alcohol abuse. (File doc. 90, Exh. 17). The Court has also considered the declaration by Petitioner's childhood friend, Robert Forrest, who states that Petitioner was introduced to drugs during junior high school, and that by 1978, Forrest and Petitioner were taking "cocaine and crystal" and Petitioner was into "meth." (Id., Exh. 20). In addition, the Court has considered the

declaration by Petitioner's former wife, Sandra Martinez, who states that she smoked marijuana with Petitioner when they were young teenagers, and when they were in their late teens, they met again at a drug rehabilitation center. (Id., Exh. 27).

Having considered the aggravating and mitigating circumstances found by the trial court, and having considered Petitioner's alleged history of drug and alcohol abuse as a mitigating circumstance, the Court finds that Petitioner has failed to establish a reasonable probability that life imprisonment would have been imposed by a reasonable trier of fact had the errors not occurred. If a reasonable trier of fact had considered Petitioner's history of drug and alcohol abuse as a mitigating circumstance while weighing the mitigating circumstances against the aggravating circumstances, that trier of fact would not have concluded that the mitigating circumstances were sufficiently substantial to call for leniency. The Court will thus deny Petitioner's request for habeas relief on Claim 8.

Claim 10: The consideration of victim impact evidence violated Petitioner's rights under the Eighth and Fourteenth Amendments.

Petitioner alleges that the trial court unconstitutionally considered victim impact evidence prior to imposing sentence in violation of Booth v. Maryland, 482 U.S. 496 (1987), overruled in part by Payne v. Tennessee, 501 U.S. 808 (1991). In particular, Petitioner claims that two statements contained in the presentence report, one by the brother of the victim and one by a police officer, were improperly admitted for the trial court's consideration prior to the imposition of sentence. Those two statements are as follows:

> (1) "Charles Dyer, the victim's brother, advised this officer that he felt the defendant deserved the death penalty. He further related that the man killed someone and it does not matter whose brother was the victim."

(2) "Detective Chambers advised this officer that he does not have a great deal of compassion for the defendant. He further related he could not think of anything mitigating in this case and believes the defendant should get a maximum sentence."

In Booth, 482 U.S. at 509, the Supreme Court held that the introduction of a victim impact statement during the sentencing phase of a capital case violated the Eighth Amendment. In Payne v. Tennessee, 501 U.S. at 831, the Supreme Court revisited Booth and overruled it in part. In Payne, the Court held that the Eighth Amendment does not erect a *per se* barrier to the admission of victim impact evidence. Id. (O'Connor, J., concurring). The Payne ruling did not disturb the Booth holding *vis a vis* the inadmissibility of characterizations and opinions from the victim's family about the crime, the defendant, or the appropriate sentence to be imposed. Id. at n. 2. In response to the concerns of Booth, the Payne Court held that "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." 501 U.S. at 825.

In the present case, the Court finds that the Superior Court's ruling was not contrary to, nor constituted an unreasonable application of, Booth or Payne, supra. In Arizona, the trial judge, rather than a jury, determines the penalty in a capital case. A.R.S. § 13-703. "Trial judges are presumed to know the law and to apply it in making their decisions." Walton v. Arizona, 497 U.S. at 653. In its July 17, 1995, Order, the Rule 32 court stated:

It is assumed the trial court considers only relevant information and disregards anything irrelevant or inflammatory from victims in the presentence report. State v. Michael Apelt, 176 Ariz. 349, 359, 861 P.2d 634 (1993). Defendant has not shown that the statements of the victim's family were considered by the trial court.

(M.E. of 7/17/95 at 5).[11] The Court will thus deny Petitioner's Tenth Claim for Relief.

Claim 11: The statutory provisions governing the Arizona capital punishment scheme violate the Fifth, Sixth, Eighth and Fourteenth Amendments.

In his Amendment Memorandum, Petitioner raises the following challenges to the Arizona statutes governing capital punishment:

> (1) By requiring mitigating evidence to meet a threshold for qualification, the statutes impose an unconstitutional barrier to the consideration of mitigating evidence;
>
> (2) The statutes fail to genuinely narrow the class of persons eligible for the death penalty and fail to provide for meaningful proportionality review;
>
> (3) The mandatory death sentence, which must be imposed if there are statutory aggravating circumstances and no mitigating circumstances sufficient to warrant leniency, results in an arbitrary and irrational death sentence; and
>
> (4) The death penalty is a cruel and unusual punishment.

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11. Ninth Circuit caselaw also suggests that the trial court's decision was not an unreasonable application of Booth or Payne. "[I]n the absence of any evidence to the contrary, [the Court] must assume that the trial judge properly applied the law and considered only the evidence he knew to be admissible." Gretzler v. Stewart, 112 F.3d 992, 1009 (9th Cir. 1997), cert. denied, 522 U.S 1081 (1998). Because Petitioner has presented no evidence that the sentencing court improperly considered victim impact evidence, he has failed to defeat the presumption that the trial court properly applied the law.

The Court will address each of these four claims in turn.

A. Threshold for Mitigation Evidence

Petitioner claims that it is unconstitutional to require persons convicted of a capital offense to prove there is mitigating evidence sufficiently substantial to call for leniency before such evidence will be considered. Petitioner has misunderstood the effect of the Arizona statute. The statute does not provide a threshold qualification of "consideration" of mitigating evidence. Rather, it requires the court to consider all relevant mitigating evidence and then determine whether the evidence, when weighed against the aggravating factors, is sufficiently substantial to call for leniency. The Constitution requires no more. Walton v. Arizona, 497 U.S. 639, 649-650, 674-675 (1990); see also Eddings v. Oklahoma, 455 U.S. 104, 113-114, (1982); Penry v. Lynaugh, 492 U.S. 302, 318 (1989). The Court will therefore deny Petitioner's request for relief on this aspect of his Eleventh Claim for Relief.

B. Death Eligibility Classification and Proportionality Review

In Furman v. Georgia, 408 U.S. 238 (1972), the United States Supreme Court held the death penalty statutes of Georgia and Texas were unconstitutional because they allowed arbitrary and unguided imposition of capital punishment. Furman caused many states to enact new capital statutes. A number of these statutes survived the Supreme Court's further guidance in Gregg v. Georgia, 428 U.S. 153 (1976). Observing that the death penalty is "unique in its severity and irrevocability," Gregg, 428 U.S. at 187, the Supreme Court concluded that a death sentence may not be imposed unless the sentencing authority focuses its attention "on the particularized nature of the crime and the particularized characteristics of the individual defendant." 428 U.S. at 206. In doing so, a court must find the presence of at least one aggravating factor and then weigh that factor against the evidence of mitigating factors. Id. at 206. The Supreme Court refined these general requirements in Zant v. Stephens, 462

U.S. 862, 877 (1983), holding that in order for a capital sentencing scheme to pass constitutional muster it must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of" the capital crime. A death penalty scheme must provide an "objective, evenhanded and substantively rational way" for determining whether a defendant is eligible for the death penalty. Zant, 462 U.S. at 879.

In addition to the requirements for determining eligibility for the death penalty, the Supreme Court has imposed a separate requirement for the selection decision, "where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence." Tuilaepa v. California, 512 U.S. 967, 972 (1994). "What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant, 462 U.S. at 879. Accordingly, a statute which "provides for categorical narrowing at the definition stage, and for individualized determination and appellate review at the selection stage" will ordinarily meet Eighth Amendment and Due Process concerns, 462 U.S. at 879, so long as a state ensures "that the process is neutral and principled so as to guard against bias or caprice." Tuilaepa, 512 U.S. at 973.

Defining specific "aggravating circumstances" is the accepted "means of genuinely narrowing the class of death-eligible persons and thereby channeling the [sentencing authority's] discretion." Lowenfield v. Phelps, 484 U.S. 231, 244 (1988). Such a circumstance must meet two requirements. First, "the [aggravating] circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder." Tuilaepa, 512 U.S. at 972; *see* Arave v. Creech, 507 U.S. 463, 474 (1993). Second, "the aggravating circumstance may not be unconstitutionally vague." Tuilaepa, 512 U.S. at 972; see Arave, 507 U.S. at 473; Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

Petitioner contends that Arizona's capital sentencing scheme generally fails to narrow the class of those eligible for capital punishment. The Court disagrees. Arizona's death penalty statute allows only certain, specific aggravating circumstances to be considered in determining eligibility for the death penalty. A.R.S. § 13-703(F). In the case at hand, the sentencing court found two aggravating circumstances: first, that Petitioner was previously convicted of felonies involving the use or threat of violence on another person, specifically murder in the second degree and assault and battery with a deadly weapon, § 13-703(F)(2); and second, that the jury found Petitioner guilty of burglary and theft and that the Petitioner committed the offense with the expectation that he would receive something of pecuniary value, § 13-703(F)(5).[12] The Arizona Supreme Court reviewed these findings and agreed with the sentencing court. Landrigan, 176 Ariz. at 6, 859 P.2d at 116.

"The presence of aggravating circumstances serves the purpose of limiting the class of death-eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by {the sentencing authority]." Blystone v. Pennsylvania, 494 U.S. 299, 306-07 (1990). Not only does Arizona's sentencing scheme generally narrow the class of death-eligible persons, §§ 13-703(F)(2) and (5) do so specifically.[13] Arizona's sentencing scheme is thus not contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court. The Court therefore will deny Petitioner's request for relief regarding this aspect of his Eleventh Claim for Relief.

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12. M.E. of 10/25/90 at 4. At the presentence hearing, the sentencing court misspoke, erroneously substituting §§ 13-703(F)(3) & (4) for § 13-703(F)(5). R.T. of 10/25/90 at 25. However, the sentencing court applied the proper standard as set forth in § 13-703(F)(5) in issuing sentence.

13. Petitioner does not argue that § 13-703(F)(2) or (5) apply to every defendant convicted of murder.

Petitioner also claims the Arizona death penalty statutes fail to provide for meaningful proportionality review and are thus unconstitutional. Petitioner raises this same argument in his Thirteenth Claim for Relief, and the Court will therefore address the merits of this claim in the context of the Thirteenth Claim for Relief.

C. Arbitrary and Irrational Nature of Mandatory Death Sentence

Petitioner claims that the mandatory imposition of the death penalty where the court finds there are aggravating factors and no mitigating factors sufficient to warrant leniency results "in an arbitrary and irrational death sentence." Petitioner cites no cases or other legal authority in furtherance of this position. Petitioner's contention was expressly rejected in the plurality opinion in Walton, 497 U.S. at 651-652 (citing Blystone v. Pennsylvania, 494 U.S. 299 (1990) (death sentence imposed only after determination that aggravating factors outweigh mitigating factors, or there are no mitigating factors, held constitutional). The Court will thus deny Petitioner's request for relief as to this aspect of Petitioner's Eleventh Claim for Relief.

D. Cruel and Unusual Punishment

For a variety of reasons, Petitioner claims that the death penalty constitutes cruel and unusual punishment. Pursuant to Gregg v. Georgia, 428 U.S. 153, 169 (1976), the Court rejects Petitioner's contention and will deny Petitioner's Eleventh Claim for Relief in its entirety.

Claim 13: **The death sentence imposed against Petitioner is inappropriate because he was denied the procedural safeguard of a meaningful proportionality review by the state appellate court. The limitation by the state court violated Petitioner's rights as guaranteed by the Eighth and Fourteenth Amendments.**

Petitioner claims that his death sentence is not proportional to similar homicide cases and that the denial of state appellate court proportionality review of his sentence was unconstitutional. Petitioner admits that there is no federal right to proportionality review where state law does not provide for such review. Pulley v. Harris, 465 U.S. 37, 43-45 (1984).

The Arizona Supreme Court did not conduct a proportionality review in this case. State v. Landrigan, 176 Ariz. 1, 8, 859 P.2d 111, 118 (1993). In State v. Salazar, 173 Ariz. 399, 416-417, 844 P.2d 566, 583-584 (1992), cert. denied, 509 U.S. 912 (1993), the Arizona Supreme Court held that proportionality reviews would no longer be conducted in death penalty cases. Thus, Petitioner had no constitutional right to proportionality review by the Arizona Supreme Court, and the Court will deny Petitioner's Thirteenth Claim for Relief.

Claims 6, 10, and 13 --- Request for Evidentiary Hearing

Petitioner has requested an evidentiary hearing be held on his Sixth, Tenth, and Thirteenth Claims for Relief. Pursuant to Rule 8 of the Rules Governing Section 2254 Cases in the United States District Court, the Court must determine whether an evidentiary hearing is required. "If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require." Rule 8(a).

An evidentiary hearing can be either mandatory or discretionary. "A habeas petitioner is entitled to an evidentiary hearing on a claim if (1) the petitioner's allegations, if proved, would entitle him to relief, and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts." Hendricks v. Vasquez, 974 F.2d 1099, 1103 (9th Cir. 1992) (internal quotes omitted), cert. denied, 517 U.S. 1111 (1996); Correll v. Stewart, 137 F.3d 1404, 1411 (9th Cir.), cert. denied, ___ U.S. ___, 119 S.Ct. 450 (1998) (colorable claim of ineffective assistance of counsel required); Totten v. Merkle, 137 F.3d 1172, 1176 (9th Cir. 1998) ("In habeas

proceedings, an evidentiary hearing is required when the petitioner's allegations, if proven, would establish the right to relief."). "[A]n evidentiary hearing is not required on issues that can be resolved by reference to the state court record[,]" Totten, 137 F.3d at 1176, or if the claim "presents a purely legal question." Hendricks, 974 F.2d at 1103.

In Townsend v. Sain, 372 U.S. 293, 313 (1963), the Supreme Court established six circumstances under which there is presumptively no "full and fair hearing" at the state level:

> (1) the merits of a material factual dispute were not resolved in a state court hearing;
>
> (2) the state factual determination is not fairly supported by the record as a whole;
>
> (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;
>
> (4) there is a substantial allegation of newly discovered evidence;
>
> (5) the material facts were not adequately developed at the state court hearing; or
>
> (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

The Townsend decision was subsequently overruled in part by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992), in which the Court held that if the failure to develop a material fact is attributable to the petitioner, a federal evidentiary hearing is required only upon a showing of cause and prejudice.

The Tamayo-Reyes Court did not alter the discretionary power of district courts to hold evidentiary hearings. See Seidel v. Merkle,

146 F.3d 750, 754 (9th Cir. 1998), cert. denied, ___ U.S. ___, 119 S.Ct. 850 (1999); Pagan v. Keane, 984 F.2d 61, 64 (2d Cir. 1993). Nor does it appear that the AEDPA altered that part of Townsend not overruled in Tamayo-Reyes. Rather, the AEDPA simply provides further limitations on a district court's discretion to hold an evidentiary hearing where "the applicant has failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). The AEDPA does not preclude an evidentiary hearing where the failure to develop the facts is not attributable to the petitioner. Jones v. Wood, 114 F.3d 1002, 1013 (9th Cir. 1997) (court dismissed restraint petition without hearing); see also Lawrie v. Snyder, 9 F.Supp.2d 428 (D. Del. 1998), certification den'd, 176 F.3d 472 (3d Cir.), cert. denied, ___ U.S. ___, 119 S.Ct. 1493 (1999). (AEDPA superseded Tamayo-Reyes but left intact remainder of Townsend). Therefore, in deciding whether a hearing is mandatory, this Court needs to consider the Townsend "full and fair hearing" standard as well as the limitations set forth in § 2254(e)(2).

A. Sixth Claim for Relief (Ineffective Assistance of Counsel)

Petitioner requests that an evidentiary hearing be held so that he can offer testimony from his trial counsel and from another attorney to demonstrate that Petitioner's trial counsel's conduct was deficient under the first prong of Strickland. Petitioner also states he would offer expert testimony regarding Petitioner's organic brain dysfunction, neurobiological dysfunction, and competency to assist with his defense.

The expert testimony Petitioner hopes to develop relating to Petitioner's organic brain dysfunction and incompetency at the time of sentencing cannot be properly considered by this Court. Petitioner failed to raise allegations of organic brain dysfunction or incompetency at sentencing in any of his state court pleadings or in his Amended Petition for Habeas Corpus Relief. In addition, he has failed to demonstrate cause and prejudice for his failure to raise these allegations in state court, and he has failed to show that a fundamental

miscarriage of justice will occur if the Court does not review these allegations. Thus, these allegations are procedurally barred from review on the merits. Vasquez v. Hillery, 474 U.S. 254, 260 (1986); see Discussion supra at 9.

No evidentiary hearing was held on the merits of this claim in the state court, although Petitioner requested an evidentiary hearing on more than one occassion [sic]. State v. Landrigan, 176 Ariz. at 8, 859 P.2d at 118 ("no hearing occurred because [Landrigan] moved to dismiss his petition for post-conviction relief")[14]; R.O.A., Photostated Instruments, Item 137 at 17 (request for evidentiary hearing in subsequent petition for post-conviction relief); M.E. of 7/17/95 (Rule 32 court did not grant request for evidentiary hearing); R.O.A., Photostated Instruments, Item 144 at 20 (renewed request for evidentiary hearing to Arizona Supreme Court). Thus, any failure to develop the material facts of Petitioner's claim of ineffective assistance of counsel is not attributable to Petitioner, and 28 U.S.C. § 2254(e)(2) does not prevent the Court from exercising its discretion and granting Petitioner an evidentiary hearing on his Sixth Claim For Relief. Accord Jones v. Wood, 114 F.3d at 1012-13.

The Court finds, however, that Petitioner has not set forth a colorable claim of ineffective assistance of counsel because there is no prejudice. Even if his allegations were proven that his counsel rendered deficient performance by failing to discover and present mitigation evidence, Petitioner would not be entitled to relief. The evidence Petitioner claims his counsel should have discovered and presented to the sentencing court would not have led the sentencing court to "[conclude] that the balance of aggravating and mitigating circumstances did not warrant death." See Strickland, 466 U.S. at

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14. Petitioner filed two separate petitions for post-conviction relief in the Rule 32 court. The first was filed on July 23, 1991, and Petitioner moved to dismiss it without prejudice on November 1, 1991. (R.O.A., Photostated Instruments, Items 102 & 109). The Rule 32 court dismissed the first petition without prejudice on November 21, 1991. (M.E. 11/21/91). The second petition was filed on January 31, 1995. (R.O.A., Photostated Instruments, Item 137).

695. The Court will therefore deny Petitioner's request for an evidentiary hearing on Claim 6.

B. Tenth Claim for Relief (Victim Impact Evidence)

The Court finds that an evidentiary hearing is not required for Petitioner's Tenth Claim for Relief (Victim Impact Evidence). The evidence which Petitioner seeks to develop is evidence that the sentencing judge impermissibly considered victim impact evidence in imposing sentence. This presents a purely legal question. The presumption that the sentencing judge correctly applied the law and considered only admissible evidence governs. Walton, 497 U.S. at 653; see also Gretzler, 112 F.3d at 1009.

C. Thirteenth Claim for Relief (Proportionality Review)

The Court finds that an evidentiary hearing is not required for Petitioner's Thirteenth Claim for Relief (Proportionality Review). Petitioner was not entitled to proportionality review as a matter of law. Pulley, 465 U.S. at 43-45.

Claims 6, 10, and 13 --- Request for Discovery

Petitioner has requested discovery on his Sixth, Tenth, and Thirteenth Claims for Relief. Discovery in habeas corpus cases is governed by Rule 6 of the Rules Governing Section 2254 Cases in the United States District Court, which provides in pertinent part:

> (a) Leave of court required. A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

"A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." Bracy v. Gramley, 520 U.S. 899, 904 (1997). "[W]here specific allegations

before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the courts to provide the necessary facilities and procedures for an adequate inquiry." Harris v. Nelson, 394 U.S. 286, 300 (1969).

A. Sixth Claim for Relief (Ineffective Assistance of Counsel)

The Court finds that Petitioner is not entitled to additional discovery on his Sixth Claim for Relief (Ineffective Assistance of Counsel). Petitioner has requested that he be allowed to obtain testimony from the Maricopa County Public Defender relating to the funding policies of the Public Defender's Office in 1989 and 1990. The Court finds that while such evidence may be relevant to Petitioner's claim that his counsel rendered deficient performance, the Court has determined that Petitioner was not prejudiced by his counsel's alleged failures. Thus, the additional discovery Petitioner seeks will not advance his Sixth Claim for Relief.

B. Tenth Claim for Relief (Victim Impact Statements)

The Court finds that Petitioner is not entitled to discovery on his Tenth Claim for Relief. Petitioner has requested that he be allowed to take the deposition of Judge Hendricks, the sentencing judge, regarding her recollection of the victim impact testimony. Petitioner has failed to demonstrate good cause to support such discovery. Moreover, "It is a firmly established rule that a judge may not be asked to testify about his mental processes in reaching a judicial decision." Thompson v. Crawford, 656 F.Supp. 1183, 1184 (S.D.Fla. 1987); see also Washington v. Strickland, 693 F.2d 1243, 1263 (5th Cir. 1982), rev'd on other grounds, 466 U.S. 668 (1984); Perkins v. LeCureux, 58 F.3d 214, 220 (6th Cir.), cert. denied, 516 U.S. 992 (1995).

C. Thirteenth Claim for Relief (Proportionality Review)

The Court finds that Petitioner is not entitled to discovery on his Thirteenth Claim for Relief. Petitioner has requested that he be allowed to obtain copies of sentencing opinions, memoranda, and minute entries in which other Arizona Superior Courts stated a factual basis for not imposing a sentence of death. Since Petitioner is not entitled to proportionality review as a matter of law, the Court finds that such evidence will not advance Petitioner's Thirteenth Claim for Relief.

CONCLUSION

Petitioner has failed to establish that he is entitled to habeas relief on any of his claims. The Court will therefore deny his requests for additional discovery and for an evidentiary hearing. The Court will also deny Petitioner's request for a writ of habeas corpus and will lift the stay of execution entered on November 4, 1996.

IT IS HEREBY ORDERED that Petitioner's request for an evidentiary hearing and his request for additional discovery are **DENIED**.

IT IS FURTHER ORDERED that Petitioner's First Amended Petition for Writ of Habeas Corpus (File doc. 30) is **DENIED WITH PREJUDICE**. The Clerk of Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that the stay of execution entered by this Court on November 4, 1996 is **VACATED**.

IT IS FURTHER ORDERED that the Clerk of Court forward a copy of this Order to the Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ 85007-3329.

DATED this __14____ day of __December_____, 1999.

/s/
Roslyn O. Silver
United States District Judge

Copies to all counsel of record.

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE
OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	
	)	No. CR 90-00066
vs.	)	No. CR 90-0323-AP
	)	
JEFFREY TIMOTHY LANDRIGAN,	)	
	)	
Defendant.	)	
	)	

Phoenix, Arizona
October 25, 1990

BEFORE: The Honorable CHERYL K. HENDRIX

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Copy
Prepared for Appeal

By: Pauline Wood
Official Court Reporter

APPEARANCES:

On behalf of the State: Mr. Jeffrey W. Sandler
Deputy County Attorney

On behalf of the Defendant: Mr. Dennis M. Farrell
Deputy Public Defender

* * * *

October 25, 1990

THE COURT: Continuation of 703 hearing. CR 90-00066, State of Arizona against Jeffrey T. Landrigan.

MR. SANDLER: Jeff Sandler appearing on behalf of the State.

MR. FARRELL: Dennis Farrell on behalf of the defendant, who is present in custody, Your Honor.

THE COURT: Mr. Farrell, who may proceed.

MR. FARRELL: Your Honor, at this time -- I had, as the Court is aware, already filed a sentencing memorandum concerning a number of mitigating factors for the Court to consider concerning my client before sentencing. I have two witnesses that I wished to testify before this Court, one I had brought in from out of state and is my client's ex-wife, Ms. Sandy Landrigan. The second witness is my client's natural mother, Virginia Gipson. I believe both of those people had some important evidence that I believed the Court should take into mitigation concerning my client. However, Mr. Landrigan has made it clear to me -- Jeffrey, the defendant -- that he does not wish anyone from his family to testify on his behalf today.

I have talked with Sandra Landrigan, his ex-wife. I have talked a number of times with her and confirmed what I thought was important evidence that she should present for the Court. And I have

also talked with Ms. Gipson, and her evidence I think is very important and should have been brought to this Court's attention. Both of them, after talking with Jeff today, have agreed with their, in one case son and the other ex-husband, they will not testify in his behalf.

THE COURT: Why not?

MR. FARRELL: Basically it's at my client's wishes, Your Honor. I told him that in order to effectively represent him, especially concerning the fact that the State is seeking the death penalty, any and all mitigating factors, I was under a duty to disclose those factors to this Court for consideration regarding the sentencing. He is adamant he does not want any testimony from his family, specifically these two people that I have here, his mother, under subpoena, and as well as having flown in his ex-wife.

I have advised him and I have advised him very strongly that I think it's very much against his interests to take that particular position. I have also advised both the witnesses I could have them sworn in and ask them questions, but they are under an obligation to do what they feel is right, Your Honor. They are looking after Jeff's interests.

I'm coming from the position that I have to bring certain evidence before this Court. I'm at a loss. I don't know what this Court wishes to do.

THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish for him to bring any mitigating circumstances to my attention?

THE DEFENDANT: Yeah.

THE COURT: Do you know what that means?

THE DEFENDANT: Yeah.

THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?

THE DEFENDANT: Not as far as I'm concerned.

THE COURT: I believe we should proceed if the witnesses are willing to testify.

MR. FARRELL: Your Honor, both witnesses have advised me they do not wish to and will not testify. If the Court wishes, we can ask each of them.

THE COURT: We will find out.

Where is Ms. Sandy Landrigan?

MS. LANDRIGAN: Right here.

THE COURT: Ms. Landrigan, will you testify today?

MS. LANDRIGAN: No, ma'am.

THE COURT: Why not?

MS. LANDRIGAN: I just wish not to.

THE COURT: Are you doing so at the instruction of Mr. Landrigan?

MS. LANDRIGAN: Yes, my ex-husband.

THE COURT: Has he asked you not to testify because you feel -- or he feels it's in his best interests?

MS. LANDRIGAN: No. I figure it's his life going on here. If he wants me not to, I don't want to.

THE COURT: Do you have mitigating circumstances that you would tell me about?

MS. LANDRIGAN: Just our past marriage.

MR. FARRELL: Your Honor, I don't know if Sandy Landrigan is aware what may be mitigating factors.

THE COURT: Anything and everything is a mitigating factor.

MR. FARRELL: I have talked with her over the phone concerning her past relationship with Jeff as well as the State's allegation of prior conviction concerning murder, and I believe that information is very relevant to this Court since she was a witness, and I believe and I think there are a number of mitigating factors she can present to the Court on Mr. Landrigan's behalf.

THE COURT: And, Mr. Farrell, what would those be?

MR. FARRELL: Your Honor, I believe one of the factors that, if the Court wishes me, what I consider --

THE COURT: Mr. Farrell, I want you -- I assume you have spoken with the witnesses that you intended to call, is that correct?

MR. FARRELL: Yes, Your Honor. I would be more than happy to relate to this Court what I expected to elicit in testimony from each of them.

THE COURT: I would appreciate that.

MR. FARRELL: From Sandy Landrigan, her relationship with Jeff, where she met him, in Texas, it was basically a place where people had substance abuse problems, in order to take care of their problems. As I pointed out in my memorandum, I believe my client has a substantial past history of substance abuse. That can be verified by Ms. Landrigan's testimony.

The fact that, after meeting him, they proceeded -- they were living in Texas and they proceeded to move back to Arizona and subsequently married and had a child together. My client took care of her and -- her two children. She had a prior child before they got married. I think she had a child prior to their marriage that was eight months old that basically Jeffrey raised as well as his own child that they raised. And I think she would be able to provide this Court with information concerning what type of a father and spouse he was, that he was a responsible person and loving, caring husband.

THE COURT: Was he employed during that period of time from time to time?

MR. FARRELL: Yes, he was.

THE COURT: Doing what?

MF. FARRELL: He was working, I believe, at a golf course during the year-and-a-half prior to the incident which occurred where he was convicted in Oklahoma of murder. And we went into great detail about the murder he was convicted of, and I think that's also a mitigating factor for the Court to consider. If the Court wishes, I could go into the details about what she told me about that situation also.

THE COURT: If you would, please, Mr. Farrell.

THE DEFENDANT: Isn't this just hearsay, what is going on here? If I wanted this to be heard, I'd have my wife say it.

THE COURT: Mr. Landrigan, I have a responsibility to see that your constitutional rights are protected.

THE DEFENDANT: I'm sitting here listening, Your Honor, to what he said and there's quite a few things he's said so far that he's got wrong.

THE COURT: Would you like to correct them?

THE DEFENDANT: Well, I wasn't just working. I was doing robberies supporting my family. We wasn't married. We wasn't married in Arizona. We lived in Oklahoma. I mean, you know, he's not getting the story straight. Why have him tell somebody else's story in the first fucking place?

THE COURT: Because I think it's important.

THE DEFENDANT: Well, he can sit here and make up anything he wants because he's sure not telling it like it is.

THE COURT: He is an officer of the Court, Mr. Landrigan, and he is ethically obligated to only make truthful avowals to the Court. If he makes anything other than truthful avowals to the Court, he can lose his license to practice law.

Continue, Mr. Farrell.

MR. FARRELL: Your Honor, additionally I talked with Sandra Landrigan about the situation of how Jeff was involved in murder in Oklahoma. And it appears from what she told me that she was expecting their child, she was in her eighth month of pregnancy, and there was a certain Greg Brown, who was a friend, a very close friend of my client, Jeffrey Landrigan. And Greg Brown was going to be the godfather of their new baby.

And they went over to his trailer one night because they had not seen him for a while and to get together with him, just basically celebrating the fact that Jeff was having a baby and Greg was to be the godfather. And Jeffrey and his wife Sandy and some other people went over to Greg Brown's trailer and they proceeded to drink that night. At least Jeffrey and Greg Brown, and I don't know who else was drinking. I think there was a quite a bit of drinking. Sandy says that she was not drinking. She remembers everything quite clearly. And they were doing quarters, which was, I believe, flipping quarters

into a shot glass and if they made it the other people had to drink the shot of whiskey.

And to make a long story short, by the end of the night everyone was quite inebriated. For whatever reason, words were spoken between Jeff and this Greg Brown. Something offensive came out of some innocent remark that one of them made. For whatever reason, an argument started. And Jeff -- I'm sorry -- Greg Brown was a much larger person than Jeffrey. And he picked up Jeff and threw him against the inside of the trailer. Sandy got in between them and said: Listen, you two guys are friends, you are best friends, you grew up together, you haven't seen each other in a while, calm down. You are both drinking. Let's leave and you guys can clear up whatever this argument is about, words that were spoken, tomorrow.

And they did. Jeff started walking out of the trailer. And from what I understand, Greg Brown pushed Sandy aside, ran up to Jeff after getting him outside the trailer and again grabbed him, pushed him, threw him up against the trailer and was going to punch him out.

Jeff happened to have a belt, and on the belt he was carrying a knife, which you could in Oklahoma. And Jeff had been drinking and at this particular time he was defending himself and he stabbed his friend one time. Unfortunately, he stabbed him through the chest into the heart. Sandy testified at the trial.

My client was convicted of first degree murder, and on appeal, from what I understand, the verdict was thrown out because they said it wasn't premeditated, and he pled guilty to second degree.

I think that's another mitigating factor concerning the scenario of how he got convicted of murder.

She also advised me concerning the conviction of his aggravated assault in prison. And the aggravated assault occurred -- here she wasn't really clear, and all I can do is give the Court

synopsis -- that there was someone in the same prison as Jeff that was a friend of Greg Brown's, and Greg Brown's father particularly, and he took offense that Jeff had killed Greg Brown and he was threatening him and Jeff defended himself and ended up stabbing this other person. And that was the conviction concerning an aggravated assault that the State has alleged.

THE COURT: Is there any other testimony you think that Ms. Landrigan would give to the Court if she decided to testify?

THE DEFENDANT: See, also, Your Honor, there's a few things he got wrong here again. I'd like to clear them up.

THE COURT: Please do, Mr. Landrigan.

THE DEFENDANT: When we left the trailer, Greg went out of the trailer first. My wife was between us. I pulled my knife out, then I was the one who pushed her aside and jumped him and stabbed him. He didn't grab me. I stabbed him.

THE COURT: Is there anything else you would like to clarify at this point, Mr. Landrigan?

THE DEFENDANT: Yeah, something else that was just said about the guy that was in prison. That wasn't Greg Brown's dad's friend or nothing like that. It was a guy I got in an argument with. I stabbed him 14 times. It was lucky he lived. But two weeks later they found him hung in his cell. He was dead. It wasn't nothing like it was presented.

THE COURT: Is there anything else you would like to clear up?

THE DEFENDANT: Not so far.

THE COURT: Mr. Farrell, are there any other circumstances you think Ms. Landrigan might testify to?

MR. FARRELL: Any other mitigating factors that I'd like presented to the Court?

THE COURT: Yes.

MR. FARRELL: Well, I was going to have his mother testify, and she --

THE COURT: No, my question referred only to Ms. Landrigan.

MR. FARRELL: Concerning Sandy Landrigan, no, Your Honor. That would be about the crux of her testimony.

THE COURT: I understand Ms. Gipson is here.

Ms. Gipson, would you like to come testify?

MS. GIPSON: No.

THE COURT: Is there anything you wish to say about your son?

MS. GIPSON: No.

THE COURT: Mr. Farrell, if Ms. Gipson were called to testify, what do you believe her testimony would be?

MR. FARRELL: Your Honor, I have talked with Ms. Gipson a number of times and she advised me about the factors that I was going to ask her concerning my client would basically -- since she didn't raise him, would be the fact that during her pregnancy what, if any, factors could possibly have affected her pregnancy. And she advises me that she and her husband, Jeffrey's natural father, were both drug users prior to her pregnancy, she was a drug user during her pregnancy, and I believe she used drugs after her pregnancy. The times and the extent I was going to bring out today, because I believe that there is some evidence that has been presented to the Court in the past concerning the possible effect on an infant when the mother takes

drugs and their particular susceptibility to drugs and their antisocial behavior resulting because of their dependency on drugs when they were -- during the period of gestation when they were being carried in their mother's body.

And I wish to establish that as a mitigating factor and, if sufficient, I was going to, after getting that testimony, I was considering asking for a recess to determine if I could substantiate the testimony that I had here today from other experts that may be available. It is a relatively new area that I'm not really familiar with. I have talked with some attorneys in the Phoenix area as well as the Tucson area concerning this type of mitigation, concerning the effect on an unborn infant when their mother is dependent on drugs and the resulting effect on the infant, neurological effect as well as any antisocial behavior. I believe there are some qualified experts in that area. Once I was able to ascertain what particular types of substances Ms. Gipson had been on, the duration, and getting some foundation, I would be able to have those particular experts come in and have the Court consider their testimony in that area.

THE COURT: Were you going to call any psychological experts such as Dr. Tatro?

MR. FARRELL: That was one name that was brought up, Your Honor. There's also -- I have been in contact with the -- I believe it's Arizona Capital Representation people and they have provided me with a number of other experts. But before I could talk with those experts about any specifics, I would have to find out what particular drugs might have been used and how long a period of time.

THE COURT: Mr. Farrell, my question was not addressed to typing up Ms. Gipson's drug use during pregnancy to the defendant's current psychological condition. My question simply was would you consider -- have you considered whether or not a psychological evaluation should be done on your client?

MR. FARRELL: I have considered it, yes.

THE COURT: All right. And have you had sufficient time to have such expert examine your client?

MR. FARRELL: Yes, I have, Your Honor.

THE COURT: And would you have a psychiatrist or psychologist standing in the wings to testify today?

MR. FARRELL: I could have, Your Honor.

THE COURT: Did you choose to, to present mitigating circumstances?

MR. FARRELL: Your Honor, at this time I do not have the information I thought necessary for those experts to testify based on the fact Ms. Gipson had not presented any specifics for me. And I thought that was really -- I understood there may be a problem and if she was not able to testify then I had no specifics for these people.

THE COURT: All right.

I have received a note indicating the jury in the Estrada case has reached a verdict. We will take the jury's verdict before we proceed in this case.

(A recess was had.)

THE COURT: All necessary and appropriate parties have now returned in CR 90-00066, State of Arizona against Jeffrey Landrigan.

Mr. Farrell, given the opportunity, would there be any other mitigating circumstances you would bring to the Court's attention?

MR. FARRELL: No, Your Honor. I do have some comments to make at the time of sentencing, but those would be the factors I'd represent to this Court in the testimony of the two witnesses that I have here today.

THE COURT: All right.

Mr. Sandler, is there any argument you wish to make?

MR. SANDLER: Your Honor, I do wish to, but before I make my argument there's a motion for new trial and a couple of constitutional challenges to the Arizona death penalty statute which have not been ruled upon.

THE COURT: Mr. Sandler, make your argument as to anything and everything at this point in time.

MR. SANDLER: As to the motion for new trial, Your Honor, I filed a response to that motion setting forth my position, as well as to the constitutional challenges.

As to sentence, Your Honor, I also filed a sentencing memorandum outlining what I believe to be the aggravating circumstances. I'd like to clarify my position on the cruel, heinous and depraved aspects.

Dr. Walker could not tell us whether or not the victim was unconscious at the time the ligature was placed around his neck. It is our position that if he were unconscious at that time the cruelty aspect would not apply. However, the heinous and depraved aspect could come into play showing the senselessness of the murder in that the defendant could have accomplished his objective of theft without killing Mr. Dyer, if he were unconscious at the time. It's our position that this is a cruel offense as defined by the statute.

The defendant's history shows a total disregard for human life, shows a total absence of remorse for this crime. We believe the only way to protect society is to impose the ultimate penalty of death, and we would ask you to do so.

THE COURT: Mr. Farrell?

MR. FARRELL: Yes, Your Honor.

Concerning all my motions for new trial and constitutionality, I would not reiterate all my arguments that are contained in my motion, but merely rely on those.

I also have provided the Court with a number of factors for the Court to consider in two sentencing memorandums. And without elaborating on each one of the factors that I consider mitigating in this particular instance, I would like to point out a couple of other factors for the Court to consider concerning possible mitigation.

One of the issues is, as this Court is aware, the State had offered to my client two different pleas prior to trial, neither of which contemplated the death penalty. And I would merely point out again for the Court that there was a parameter of sentencing that this Court could have sentenced my client to with either one of those pleas. But my client decided to exercise his constitutional right to a jury trial. And now that my client exercised that right, the State is speaking to penalize him by seeking the death penalty. I believe that that shows that justice, as far as the State is concerned, would have been accomplished prior to trial by some period of time of incarceration, and I don't think that any factors have been presented to this Court that were not -- the State was not aware of prior to trial. Consequently, I think the State's position of the death penalty is unwarranted.

There was one other issue concerning pecuniary gain. The Court heard all the testimony at trial. I don't believe that there was any testimony that anything was stolen from the victim's apartment. It was the State's contention there was a check that was stolen. They had some evidence the victim might have cashed that check himself. It was the State's contention some articles of clothing might have been taken, but there was evidence that that clothing, the shirt in particular, might have been given to Jeffrey Landrigan. As far as pecuniary gain, Your Honor, I don't think any of that was proven at trial.

Outside of the issues that I presented here today and the ones contained in my sentencing memorandum as well as the memorandum concerning constitutionality as far as the death penalty, I have nothing further to add at this time.

THE COURT: Mr. Sandler, anything further?

MR. SANDLER: No.

THE COURT: Based upon the jury verdict returned on June 28 of 1990, it is the judgment of this Court that the defendant is guilty in Count I of burglary, second degree, a class 3 felony, in violation of A.R.S. Section 13-1507, 1501, 701, 702, 801 and 812; in Count II, that the defendant is guilty of theft, a class 1 misdemeanor, committed in violation of A.R.S. Section 13-1801, 1802, 707 and 802; and in Count III, of murder, first degree, concerning the death of Chester Dean Dyer as a class 1 felony, in violation of A.R.S. Section 13-1105, 1101, and 703. Regarding all of these offenses, statutory references to A.R.S. Section 13-301, 302, 303 and 304 also apply. All of these offenses were committed on December 13th of 1989 in Maricopa County.

The jury has also found these offenses are repetitive offenses pursuant to A.R.S. Section 13-604(B), the defendant having previously been convicted of assault and battery with a deadly weapon on March 21st of 1986 in Pittsburgh County, Oklahoma, in CR F-85-116, and the defendant having previously been convicted of second degree murder on September 5th of 1985 in Washington County, Oklahoma in Cause No. F-82-228, and possession of marijuana on February 11th of 1981 in Washington County, Oklahoma in Cause No. F-80-338.

In reviewing the file I also found that the allegation of dangerousness had been alleged.

Mr. Sandler, at some point during the trial did we dismiss that allegation?

MR. SANDLER: Your Honor, I think we ended up concluding it did not apply to the offenses that were the burglary and theft counts.

THE COURT: All right. In the event I never formally dismissed it, at this time it is ordered dismissing the allegation of dangerousness.

Mr. Farrell, is there anything else you wish to say on behalf of your client?

MR. FARRELL: Nothing, Your Honor.

THE COURT: Mr. Landrigan, is there anything you wish to say in your own behalf at this time?

THE DEFENDANT: Yeah. I'd like to point out a few things about how I feel about the way this shit, this whole scenario went down. I think that it's pretty fucking ridiculous to let a fagot be the one to determine my fate, about how they come across in his defense, about I was supposedly fucking this dude. This never happened. I think the whole thing stinks. I think if you want to give me the death penalty, just bring it right on. I'm ready for it.

THE COURT: Is there anything else you would like to say in your own behalf, Mr. Landrigan?

THE DEFENDANT: I think that about covered it.

THE COURT: Anything further on behalf of the State?

MR. SANDLER: No.

THE COURT: Is there any legal cause why sentence should not now be pronounced?

MR. FARRELL: No. No legal cause, Your Honor.

THE COURT: With no legal cause appearing, it is ordered denying the motion for new trial.

The defendant has also filed a response to the State's sentencing memorandum which included some constitutional challenges to A.R.S. Section 13-703. I believe all of those challenges have been addressed in Jeffrey Allen Walton against the State of Arizona and Lewis against Jeffers, both cases having been decided by the United States Supreme Court this year. The United States Supreme Court has decided those issues against the position argued by the defendant.

The defendant has also argued that death by lethal gas is cruel and unusual punishment. This argument was rejected in Gray against Lucas, 710 Fed.2d 1048.

Presentence hearings have been conducted on various and sundry issues and have been reflected in the record. The State and defendant have presented evidence and argument concerning the existence and nonexistence of aggravating and mitigating circumstances. Both parties have been given the opportunity to present any relevant evidence of mitigation.

Based upon the evidence presented at trial, the evidence received at the sentencing hearing and arguments of counsel, the Court hereby renders the following special verdict:

The State originally listed A.R.S. Section 13-703 (F) (1), (2) and (5) as aggravating circumstances in its notice filed on February 27th of 1990. In the sentencing memorandum the State has alleged and has presented evidence as to aggravating circumstances (F) (2), (5) and (6). They are as follows: The defendant was previously convicted of a felony involving the use or threat of violence on another person, specifically murder second degree and assault and battery with a deadly weapon; commission of the offense for the receipt or in expectation of the receipt of anything of pecuniary value;

and commission of the offense in an especially heinous, cruel or depraved manner.

Therefore, the Court finds the State has not alleged or proven the existence of aggravating circumstances under A.R.S. Section 13-703 (F)(1), (3), (4), (7), (8), (9) and (10).

As to A.R.S. Section 13-703, subparagraph (F)(2), the jury found that the defendant has previously been convicted of felonies involving the use or threat of violence on another person, specifically murder in the second degree and assault and battery with a deadly weapon. The pen packet from the State of Oklahoma, Exhibit No. 86, shows that the offense of assault and battery with a deadly weapon involved the use of violence on another person. Specifically, the defendant used a knife-like object known as a shank to cut, slash and stab Ronnie Cartwright in the arms and central chest area between the rib cage and sternum, inflicting serious and grievous wounds. Additionally, the offense of murder in the second degree involves the use of violence upon another person. Therefore, the State has proven beyond a reasonable doubt that the defendant has previously been convicted of a felony involving the use or threat of violence on another person.

As to Element No. 703 (F)(3), the jury also found the defendant guilty of burglary and theft. The evidence presented at trial shows that the victim's apartment was ransacked. It clearly appeared from the photographs admitted into evidence that the individual who perpetrated the offense was looking for something. It does not make any difference whether or not they received or found anything of value and made off with it. The element of (F)(3) or (F)(4) is demonstrated as long as there was an expectation that something of value be received. The evidence has demonstrated that. Therefore, the Court finds the State has proven beyond a reasonable doubt that the defendant procured the commission of the offense with the expectation of receiving something of pecuniary value -- excuse me -- he committed the offense with the expectation that he would receive something of pecuniary value.

The State has alleged that subsection (6) also applies in that the defendant committed the offense in an especially heinous, cruel or depraved manner. The element of cruelty relates to the pain, mental anguish and physical abuse or distress experienced by the victim before death. Mental anguish includes a victim's uncertainty as to his ultimate fate. Cruelty is present as aggravating circumstances if it is reasonable to conclude there was terror and horror present in the victim's mind. If mental anguish is foreseeable after inflicting the mortal blow, then cruelty exists. The State must show beyond a reasonable doubt that the victim was conscious when acts of violence causing the death were committed. The evidence in this case is that the victim was probably not conscious when he was strangled. And therefore, the Court finds the State has not proven beyond a reasonable doubt that the defendant committed the offense in an especially cruel manner.

The elements of heinousness and depravity focus on the murderer's state of mind, the mental state and the attitude of the perpetrator as reflected in words and actions. There are five elements used to describe what is heinous and depraved: The apparent relishing of the murder by the killer evidencing debasement or perversion, indifference to the suffering of the victim evidencing a sense of pleasure which the defendant took in the killing; the infliction of gratuitous violence on the victim beyond that necessary to kill; the needless mutilation of the victim; the senselessness of the crime; and the helplessness of the victim. There is no evidence of relishing or gratuitous violence and there was no needless mutilation. And the last two elements alone, the senselessness of the crime and the helplessness of the victim, standing alone do not establish that the crime was especially heinous or depraved.

The law also states that the elements of heinousness and depravity can be found if the offense was committed to prevent the victim from testifying against the defendant concerning a felony that occurred contemporaneously with the murder. The Court finds that, although perhaps circumstantial evidence might lead one to reach this result, it has not been proven beyond a reasonable doubt.

The defendant has not alleged the existence of mitigating circumstances under elements (G)(2), (3) or (4). Viewing all of the evidence presented, the Court finds they do not apply. There is no indication under subsection (G)(2) that the defendant was under unusual or substantial duress, although not such as to constitute a defense to prosecution.

The defendant has not alleged mitigation under element (G) 93). The defendant was legally accountable for the conduct of another under the provisions of A.R.S. Section 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

Mitigation has not been alleged under element (G)(4) that the defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which the defendant was convicted would cause a grave risk of causing death to another person, or under (G)(5), the defendant's age.

The defendant's state of intoxication has been alleged as a mitigating circumstances under element (G)(1), that the defendant's capacity to appreciate the wrongfulness of his conduct and his ability to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution. In the sentencing memorandum it is argued that evidence was presented at trial that the defendant drank quite a bit, smoked marijuana and did drugs. I do not recall any testimony about drinking or drug use. I do recall some evidence regarding the use of marijuana. However, no evidence has been presented to show that the apparent use of marijuana affected the defendant's capacity to appreciate the wrongfulness of his conduct or impaired his ability to conform his conduct to the requirements of law. Additionally, drug or alcohol intoxication, in and of itself, is not a mitigating circumstance.

The defendant has offered the following nonstatutory factors in mitigation: A difficult family history. The background and

emotional character of a defendant, while not making the defendant unable to commit a crime, is a factor that may be considered in mitigation. A difficult family background, in and of itself, however, is not a mitigating circumstance. I have received very little information concerning the defendant's difficult family history. I did find at age 17 the defendant denied any serious family problems and stated that most of his difficulties were of his own doing. The defendant described his father, who was a geologist, as a sober person who doesn't drink, who gives lots of love, he is not too strict, he is pretty lenient, with the only criticism being he was too easy to manipulate.

The defendant indicated that he resented his mother because she tried to dominate him. Perhaps that was because she was not easy to manipulate. And the defendant did express some concern that his mother had a drinking problem. However, the fact that one's mother may have had a drinking problem is not sufficient to be a mitigating circumstance.

The Court has also considered the evidence presented by way of avowals from Mr. Farrell here today concerning possible drug use by the defendant's natural mother during the defendant's (sic) pregnancy. I will assume for the purpose of these hearings that those are true statements. I'm also going to accept as true that which I have read in the newspaper, which is always dangerous, to the extent that when a mother uses drugs during pregnancy it affects the fetus and the person who results is more likely than not to have a similar drug addiction. However, even assuming all those things are true, there has been no showing that the defendant's proclivity or propensity toward drug use and drinking impaired his ability to understand or his capacity to appreciate the wrongfulness of his conduct and conform his conduct appropriately.

Love of one's family and love to one's family can be a mitigating circumstance. From the presence of Ms. Gipson alone and from Mr. Landrigan's ex-wife, I will assume that there are feelings

of love that have caused them to appear here today. And I do find that that does constitute a mitigating circumstance.

Another mitigating circumstance which has been alleged is the defendant's good conduct while in jail and good conduct in the courtroom. I believe it was Mr. Landrigan's intention today to take away the mitigating circumstance that, up until now, he had acted appropriately in the courtroom. I hope at least Mr. Landrigan has been able to release some of his frustration here today.

No evidence has been presented concerning the defendant's good conduct while in custody. And the Court must take note of the fact that while the defendant was in the custody of the Department of Corrections of the State of Oklahoma that he did escape. Therefore, I find conduct while in prison does not constitute a mitigating circumstance in this case.

It's also been alleged that there is no evidence of premeditation. The Court will take note that the jurors found in this case the defendant was guilty of felony murder. The Court will also take note however, that the theory of premeditation was not submitted to them. The Court does not know whether this murder was premeditated or not, but the Court will at least concede for the purpose of this hearing that there was no evidence of premeditation and will find that to be a mitigating circumstance.

Because the only theory of culpability the jury was instructed on in this case was felony murder or accomplice culpability, the Court must determine whether the defendant was the actual killer or only an accomplice. If the defendant was not the actual killer but only an accomplice to the felony that led to the killing or an accomplice to the act of killing, the Court may impose death only if it finds that the defendant attempted to kill -- or intended to kill or that the defendant was a major participant in the act which led to the killing and the defendant exhibited a reckless indifference to human life. The Court finds from the evidence introduced at trial, the evidence at the sentencing hearing and the entire case, and with particular regard the

Court would point to the testimony of Cheryl Smith that she had a conversation with the defendant when he indicated that he murdered someone, the Court finds that the defendant was the actual killer, that he intended to kill the victim and was a major participant in the act. Although the evidence shows that another person may have been present, the Court finds that the blood spatters on the tennis shoes of the defendant demonstrate that he was the killer in this case.

After weighing and considering the aggravating circumstances that the defendant had two prior felony convictions involving the use of violence on another person and committed the offense with the expectation of pecuniary gain, and considering the mitigating circumstances of love of family, love of his family for him -- I believe I found one other mitigating circumstance.

Mr. Farrell, could you refresh my recollection?

MR. FARRELL: I believe the Court has advised that since there was no premeditation --

THE COURT: -- and no premeditation -- thank you very much -- existed.

After weighing and considering these, I find that the mitigating circumstances do not outweigh the aggravating circumstances.

I'm also required to consider the nature of the person and the nature of the offense involved. I find the nature of the murder in this case is really not out of the ordinary when one considers first degree murder, but I do find that Mr. Landrigan appears to be somewhat of an exceptional human being. It appears that Mr. Landrigan is a person who has no scruples and no regard for human life and human beings and the right to live and enjoy life to the best of their ability, whatever their chosen lifestyle might be. Mr. Landrigan appears to be an amoral person.

Therefore, it is the judgment of this Court that as to Count I, with the aggravating circumstances being three prior felony convictions and no mitigating circumstances, it is the judgment of this Court that the defendant shall be imprisoned with the Department of Corrections for the aggravated term of 20 years. And the defendant is given credit for 294 days of presentence incarceration.

On Count II the defendant is sentenced to serve six months in the Maricopa County Jail. The defendant is entitled to credit for 294 days. Therefore, the defendant has served his sentence on that charge.

On Count III, it is the judgment of this Court that the defendant shall be sentenced to death with the Department of Corrections.

The defendant must pay, pursuant to A.R.S. Section 13-812, $200 to the Victims Compensation Fund for Counts I and III.

The sentences on Counts I and III shall be concurrent with each other, but consecutive to the sentence imposed in Cause No. F-82-228, murder in the second degree out of the district court of the 11th Judicial District, Washington County, Oklahoma.

Mr. Landrigan, as to Counts I and II, if you wish to appeal you must file your notice of appeal within 20 days. As to Count III, there will be an automatic notice of appeal of this case to the appropriate appellate court.

You do have the right to appeal from the judgment of this Court and to have a lawyer represent you. If you cannot afford a lawyer, one will be appointed. If you cannot afford the necessary records and transcripts, they will be provided to you free of charge. If you want to appeal, you must do so within 20 days from today's date as to Counts I and II. An automatic notice of appeal will be filed as to Count III. You will be required to file a notice of appeal.

We stand at recess.

(The proceedings were concluded.)

APPENDIX E

JAN J. RAVEN
P.O. Box 710
Phoenix, Arizona 85001
(602) 840-9118
State Bar Attorney No. 011676
ATTORNEY FOR PETITIONER

IN THE SUPERIOR COURT OF MARICOPA COUNTY, ARIZONA

STATE OF ARIZONA,	)	
	)	
Respondent,	)	No. CR 90-00066
	)	
v.	)	AFFIDAVIT
	)	
JEFFREY T. LANDRIGAN,	)	Hon. Cheryl K. Hendrix
	)	
Petitioner.	)	
	)	
STATE OF ARIZONA	)	
	)	ss.
COUNTY OF PINAL	)	

JEFFREY T. LANDRIGAN, being first duly sworn, upon his oath, deposes and says:

1. That he is the Petitioner in the above-entitled case.

2. That his biological father is Darrel Wayne Hill, his biological mother is Letha Virginia Hill (now Gibson), and that these biological parents lived together during Ms. Gibson's pregnancy with Petitioner and for a period of time after his birth.

3. That Petitioner's biological father, Darrel Wayne Hill, was on death row in the state of Arkansas at the time of Petitioner's conviction and sentence.

4. That Petitioner learned of and had contact with Darrel Wayne Hill only after he was incarcerated following his conviction in the state of Oklahome [sic] for murder in the first degree.

5. That Petitioner advised his trial counsel of the facts stated above.

6. That on information and belief, Petitioner advises that Mr. Hill was available to confirm the foregoing facts and to confirm Ms. Gibson's alcohol and drug use during her pregnancy.

7. That Petitioner is aware of a family history of violence including the foregoing, and including Petitioner's biological grandfather, biological brother, and biological child.

8. That despite the foregoing trial counsel did not discuss with Petitioner, nor to his knowledge consider presenting testimony regarding the biological component of violence, as mitigation evidence at sentencing.

9. That had trial counsel raised this aspect of mitigation evidence with him, Petitioner would have cooperated in presenting that evidence and, on information and belief, Mr. Darrel Hill would also have cooperated.

Further, affiant saith not.

/s/
JEFFREY T. LANDRIGAN
Affiant

SUBSCRIBED AND SWORN TO before me this _24__ day of _JAN____, 1995.

19 June 1997 _____/s/_____
My Commission Expires Notary Public

APPENDIX F

FILED
JUL 20 '95
Clerk of the Court

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CLERK OF THE COURT

July 17, 1995 JUDGE CHERYL K. HENDRIX
E. Schneider
Deputy

No. CR 90-00066

STATE OF ARIZONA

Attorney General
by: Joseph J. Maziarz

v.

JEFFREY TIMOTHY LANDRIGAN

Jan J. Raven

Jeffrey Timothy Landrigan
#82157
ASPC-Florence
P.O. Box 629
Florence, AZ 85232

Criminal Court Admin.

Appeals

Victim Witness Division

A Petition for Post-Conviction Relief was filed on January 31, 1995. A response was filed on February 23, 1995. No reply has been received.

A. DEATH QUALIFYING THE JURY

Petitioner contends the court erred in "death qualifying" the jury and that such conduct violates his constitutional rights under the Sixth and Fourteen Amendments. This is an issue that should have been raised on appeal. Under Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure, a defendant is precluded from relief based upon any ground waived on appeal. Although the Supreme Court has disapproved the "kitchen sink" approach in appellate briefs, it has suggested brevity, especially when raising frivolous issues. State v. West, 176 Ariz. 432 at 439, 862 P.2d 192 (1993).

Notwithstanding preclusion, defendant's claim is without merit.

> Because defendant did not object when these jurors were excused and affirmatively passed the jury panel at the close of voir dire, he is precluded from challenging the jurors on appeal. Id.

In State v. West, Id., the Supreme Court quotes from State v. Martinez-Villareal, 145 Ariz. 441, 449, 702 P.2d 670, 678, *cert. denied*, 474 U.S. 975, 106 S. Ct. 339, 88 L. Ed. 2d 324 (1985):

> [J]ury questioning regarding capital punishment is permissible where the questioning determines bias of a nature which would prevent a juror from performing his duty . . . . [V]oir dire questioning related to a juror's views on capital punishment is permitted to determine whether those views would prevent or substantially impair the performance of the juror's duties to decide the case in accordance with the court's instructions and the juror's oath.

The questions asked, as quoted in the petition, were to determine whether the prospective jurors had opinions which would prevent them from fairly and impartially considering the evidence. The questions asked were proper.

B. NEWLY DISCOVERED EVIDENCE.

Petitioner claims there is newly discovered evidence. That newly discovered evidence is evidence that the victim's last pay check was never cashed. This is not newly discovered evidence. The State's Response to the Motion for Judgment of Acquittal or Motion for New Trial recites "The State has received information that the check was never cashed." The fact that the check was not cashed was made known to the defendant in July of 1990.

Count II of the indictment charges defendant with theft of the payroll check and clothing. The fact that the check was never cashed does not mean the defendant did not take the check. The theft count does not evaporate if it is subsequently discovered the check was still in the victim's apartment (which has not been alleged as newly discovered evidence). The defendant was also charged with theft of clothing. The evidence remains unrefuted and uncontradicted defendant had in his possession some of the victim's clothing.

Defendant is not entitled to relief on the basis of newly discovered evidence, Rule 32.1(e) of the Arizona Rules of Criminal Produced, [sic] because the fact would not have changed the verdict or the sentence.

C. INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

1. Petitioner claims counsel was ineffective at sentencing because defendant's biological father and his adopted sister were not contacted by his attorney and counsel "failed to explore additional grounds for arguing mitigation evidence."

To present a viable claim of ineffective assistance of counsel, the defendant must establish counsel's conduct fell below an objective standard of prevailing professional norms and there is a reasonable probability that the result would be different. Strickland v. Washington, 466 U.S. 668 (1984).

Since defendant instructed his attorney not to present any evidence at the sentencing hearing, it is difficult to comprehend how defendant can claim counsel should have presented other evidence at sentencing.

> THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish for him to bring any mitigating circumstances to my attention?
>
> THE DEFENDANT: Yeah.
>
> * * *
>
> THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?
>
> THE DEFENDANT: Not as far as I'm concerned.

Since the defendant instructed his attorney not to bring any mitigation to the attention of the court, he cannot now claim counsel was ineffective because he did not "explore additional grounds for arguing mitigation evidence".

Defendant now seeks to avoid the stance he assumed at trial by stating that if counsel had sought to provide evidence of a family history of violence defendant "would have cooperated". Affidavit of Jeffrey T. Landrigan. Again, the defendant's statements at sentencing belie his new-found sense of cooperation. The defendant said he told his attorney not to present any mitigating evidence.

Notwithstanding the frivolous nature of the claim, defendant is precluded from relief on the basis of ineffective assistance of counsel at sentencing. A defendant is precluded from relief on any ground finally adjudicated on appeal. Rule 32.2(a)(2). Although the Supreme Court usually does not entertain claims of ineffective assistance of counsel unless the matter has first been addressed by the trial court, it departed from its customary procedure because it "determine[d] from the record that the ineffective assistance claim is meritless." State v. Landrigan, 176 Ariz. 1 at 8, 859 P.2d 111 (1993).

D. CONSIDERATION OF PRESENTENCE REPORT CONTAINING FAMILY RECOMMENDATION OF DEATH SENTENCE.

Petitioner asserts err occurred when the court considered the presentence report which contained statements of the defendant's family.

This is an issue which should be raised on appeal. The defendant cannot be granted relief based upon any ground waived on appeal. Rule 32.2 (a)(3) of the Arizona Rules of Criminal Procedure. Notwithstanding preclusion, the claim is without merit. It is assumed the trial court considers only relevant information and disregards anything irrelevant or inflammatory from victims in the presentence report. State v. Michael Apelt, 176 Ariz. 349, 359, 861 P.2d 634 (1993). Defendant has not shown that the statements of the victim's family were considered by the trial court. Defendant has failed to show prejudice.

E. DEATH PENALTY IS UNCONSTITUTIONAL.

Petitioner asserts the death penalty is unconstitutional for several reasons. If the defendant was serious about having these issues properly addressed, they should have been raised on appeal. Because they were not raised, they were waived and the defendant is

precluded from being granted relief. The defendant probably did not raise the issues on appeal because they are without merit.

1. Defendant claims the death penalty is unconstitutional because the county attorney has discretion to decide whether to seek the death penalty.

The existence of discretion does not affect the validity of defendant's sentence. State v. Michael Apelt, 176 Ariz. 349 at 359, 861 P.2d 634 (1993); McCleskey v. Kemp, 481 U.S. 279, 296-97, 107 S. Ct. 1756, 1769-70, 95 L.Ed.2d 262 (1987); State v. West, 176 Ariz. 432, 454, 862 P.2d 192 (1993); State v.White, 168 Ariz. 500, 515, 815 P.2d 869, 884 (1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1199, 117 L.Ed. 2d 439 (1992); State v. Rossi, 146 Ariz. 359, 366, 706 P.2d 371, 378 (1985).

2. The statute is unconstitutional because it does not require the State to prove the death penalty is "appropriate."

The defendant is mistaken in asserting that the statute does not require a determination of "appropriateness". The State has the burden to prove aggravating factors beyond a reasonable doubt. If the State has met that burden, both the trial court and the Supreme Court determine the appropriateness of the penalty. State v. Gillies, 135 Ariz. 500, 511, 662 P.2d 1007, 1018 (1983); State v. LaGrand, 153 Ariz. 21, 34, 734 P.2d 563, 576 (1987); State v. White, 168 Ariz. 500, 510, 815 P.2d 869, 879 (1991) *cert. denied*, ___ U.S. ___, 112 S.Ct. 1199, 117 L.Ed.2d 439 (1992).

3. The statute precludes weighing all mitigation evidence and places the burden of proving mitigation on the defendant.

The court believes defendant misconstrues the statute to reach the conclusion that the statute precludes weighing all of the mitigation evidence. Although a defendant must prove mitigating circumstances by a preponderance of the evidence, State v. Greenway, 170 Ariz. 155 at 168, 823 P.2d 22 at 35 (1991), the judge must consider "any

aspect of the defendant's character or record and any circumstance of the offense relevant to determining whether the death penalty should be imposed," State v. Kiles, 175 Ariz. 358 at 373, 857 P.2d 1212 at 1227, and must consider all evidence offered in mitigation. State v. Ramirez, 178 Ariz. 116, 131, 871 P.2d 237, 252, *cert. denied*, 115 S.Ct. 435 (1994). Requiring the defendant to prove mitigating circumstances by a preponderance of the evidence is constitutional. Walton v. Arizona, 497 U.S. 639, 649-51, 110 S.Ct. 3047, 3054-55 (1990).

4. The bias and prejudice of the sentencer cannot be voir dired.

This argument has been raised and rejected in State v. West, supra, State v. Stanley, 167 Ariz. 519 at 527, 809 P.2d 944 at 952 (1991); State v. Rossi, 154 Ariz. 245, 247-48, 741 P.2d 1223, 1225-26 (1987).

5. The death penalty is cruel and unusual punishment.

The death penalty is not cruel and unusual punishment if it is not imposed in an arbitrary and capricious manner. Gregg v. Georgia, 428 U.S. 153, 195, 96 S.Ct. 2909, 2935-36 (1976); State v. Blazak, 131 Ariz. 598, 601, 643 P.2d 694, 697, *cert. denied*, 459 U.S. 882, 103 S.Ct. 184 (1982).

6. A proportionality review is constitutionally required.

Defendant concedes that the law is to the contrary. State v. Salazar, 173 Ariz. 399, 416-17, 844 P.2d 566, 583-84 (1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 3017, 125 L.Ed. 2d 707 (1993). It is petitioner's contention that this decision must be reconsidered. It is not the function of the lowly trial court to reconsider decisions of the lofty Supreme Court.

The court finds there are no genuine material issues of fact or law in dispute and that future proceedings would not serve any useful purpose.

IT IS ORDERED dismissing the petition.

(2)

No. 05-1575

Supreme Court, U.S.
FILED
AUG 9 - 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DORA B. SCHRIRO, *et al.*,

Petitioners,

v.

JEFFREY TIMOTHY LANDRIGAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Respondent, Jeffrey Timothy Landrigan, did nothing to impede his trial counsel's ability to conduct an investigation for the sentencing phase of the capital proceedings. To the contrary, respondent met with a psychologist and authorized the release of various records. At the sentencing hearing, respondent simply told trial counsel not to present testimony by two witnesses. The failure here is that trial counsel did not conduct an adequate investigation and was therefore unable to present mitigating evidence at the sentencing hearing. The court of appeals found that counsel did little to prepare for the sentencing hearing. After determining respondent made a colorable claim of deficient performance and prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny, the court remanded this matter to the district court for an evidentiary hearing.

The question presented is whether the court of appeals properly applied the standard set forth in *Strickland* when it remanded the case to the district court for an evidentiary hearing after concluding respondent raised a colorable claim that trial counsel was ineffective at the sentencing phase of the capital proceedings.

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1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1980) 7, 10

Respondent, Jeffrey Timothy Landrigan, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the *en banc* opinion by the Ninth Circuit in this case. The opinion is reported at 441 F.3d 638 (9th Cir. 2006) (*en banc*).

STATEMENT OF THE CASE

Respondent respectfully directs this Court to, and adopts herein, the detailed recitation of the underlying facts and procedural history set forth in the opinion below.[1]

REASONS FOR DENYING THE PETITION

1. Respondent was convicted of first degree murder in Arizona and sentenced to death. His conviction and sentence were affirmed on direct appeal. *State v. Landrigan*, 859 P.2d 111 (Ariz. 1993).[2] In state collateral proceedings, respondent raised a claim of ineffective assistance of trial counsel. To support this claim, he sought appointment of experts and an evidentiary hearing. Those requests were denied. *Landrigan v. Schriro*, 441 F.3d at 643. Apx. A-6. In habeas corpus proceedings in the district court, respondent moved to expand the record to include declarations by persons familiar with respondent's background as well as mental health experts. The request was granted in part. However, respondent's request for an evidentiary hearing was denied. 441 F.3d at 641. Apx. A- 6. The district court denied the petition on the

---

1. Petitioners attached as Appendix A to their petition for writ of certiorari a copy of the opinion below. Reference to the opinion below in this brief will be to Appendix A and will be noted as "Apx. A- ____."

2. Petitioners did not append the state supreme court opinion to the petition for writ of certiorari.

merits and in so doing, concluded that even if trial counsel's performance was deficient, respondent did not show prejudice. *Id.* On appeal, a three-judge panel upheld the decision of the district court. *Landrigan v. Stewart*, 272 F.3d 1221 (9th Cir. 2001). Petition for Writ of Certiorari at Appendix B. Subsequently, the court of appeals granted rehearing *en banc*, *Landrigan v. Stewart*, 397 F.3d 1235 (9th Cir. 2005), and reversed the district court.

The court of appeals relied upon *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny in reaching its decision. Citing to *Rompilla v. Beard*, 545 U.S. 374, ___, 125 S. Ct. 2456, 2462-63 (2005), and *Wiggins v. Smith*, 539 U.S. 510, 534-38 (2003), the court concluded respondent "made a colorable claim that he did not receive effective assistance of counsel in his sentencing" and remanded the case to the district court for an evidentiary hearing. *Landrigan*, 441 F.3d at 642. Apx. A-7.

In *Strickland*, this Court established the standard for addressing claims of ineffective assistance of counsel at capital trials and for determining whether any such deficient performance was prejudicial to the defendant. The analytic process set forth in *Strickland* has been repeatedly reviewed and affirmed by this Court. *See Rompilla*, 125 S. Ct. at 2469 ("[T]oday's decision simply applies our longstanding case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under *Strickland*. . . .") (O'Connor, J., concurring); *Wiggins*, 539 U.S. at 521-23 (reiterating that *Strickland* is the metric by which claims of ineffective assistance of counsel are judged); *Terry Williams v. Taylor*, 529 U.S. 362, 391-95 (2000) (discussing the *Strickland* analysis in detail). This case presents no compelling reason to depart from such solid precedent.

a. In finding a colorable claim of deficient performance of trial counsel under *Strickland*, the court of appeals was guided by 28 U.S.C. § 2254(d)(2). Relying upon *Terry Williams*, 529 U.S. at 396, *Wiggins*, 539 U.S. at 522-23 and *Rompilla*, 125 S. Ct. at 2466, the court of appeals determined that based upon the record before it, "counsel did little to prepare for the sentencing aspect of the case." *Landrigan*, 441 F.3d at 643. Apx. A-10. The court went on to observe that "the initial investigation *did* reveal potential mitigating evidence, but that evidence was not developed." *Id.* at 644. Apx. A-11. The court expressed "grave doubts whether Landrigan received effective assistance of counsel during his penalty phase proceeding." *Id.* at 645. Apx. A-12.

Of note was an event that occurred at the sentencing hearing. The state supreme court and the state post-conviction court determined respondent instructed his lawyer not to present mitigating evidence. The court of appeals took issue with these findings and observed they were "an overly broad characterization" of what actually occurred and were not supported by the record. *Landrigan*, 441 F.3d at 647. Apx. A-16. The court concluded the state court findings "amount[ed] to an 'unreasonable determination of the facts.'" *Id.* (quoting 28 U.S.C. § 2254(d)(2)).

The court of appeals also concluded that even if it overlooked the erroneous findings by the state courts, counsel's failure to conduct an adequate investigation before the sentencing hearing was not reasonable and could not be excused. *Landrigan*, 441 F.3d at 647 (discussing *Wiggins*, 539 U.S. at 522-23 and *Terry Williams*, 529 U.S. at 396). Apx. A-16. The state post-conviction court's conclusion that respondent's claim was "'frivolous' and 'meritless' was an unreasonable application" of this Court's precedent. *Id.* (citing 28 U.S.C. § 2254(d)(1)).

b. The court of appeals then addressed the prejudice prong of *Strickland*. Following the direction set forth in *Wiggins*, 539 U.S. at 534 and *Terry Williams*, 529 U.S. at 397-98, the court of appeals reviewed the mitigating evidence adduced at trial and in the habeas proceedings. *Landrigan*, 441 F.3d at 648. Apx. A-18. The court, citing *Terry Williams*, 529 U.S. at 398, and *Boyde v. California*, 494 U.S. 370, 381 (1990), determined the allegations put forth by respondent, "[i]f true, . . . are the very sort of mitigating evidence that might well have influenced the judge's appraisal of Landrigan's moral culpability." *Id.* at 649 (brackets, internal quotations and citations omitted). Apx. A-19. Had this information been presented, the court of appeals concluded, "there is a reasonable probability that, if Landrigan's allegations are true, the sentencing judge would have reached a different conclusion." *Id.* at 650. Apx. A-21.

c. Having determined that respondent set forth a colorable claim of ineffective assistance of counsel at sentencing, the court of appeals went on to consider whether he was entitled to an evidentiary hearing under 28 U.S.C. § 2254(e). Relying on *Michael Williams v. Taylor*, 529 U.S. 420, 432 (2000), the court concluded "Landrigan did not 'fail to develop' the factual basis for his ineffective assistance claim in state court." *Landrigan*, 441 F.3d at 642. Apx. A-8. In state post-conviction proceedings, respondent sought the appointment of an expert and an evidentiary hearing to further develop his claim of ineffective assistance of counsel at sentencing.[3] Both requests were denied by the state court.

3. During state collateral proceedings, the state of Arizona opposed respondent's request and argued it was "simply a waste of time and scarce resources to pay a medical expert to explore" allegations of ineffective assistance at sentencing. Trial Docket, Dec. 5, 1995 at 125, p. 4.

Id. at 643. Apx. A-9. The court of appeals found that respondent was not precluded from seeking an evidentiary hearing in the federal court under 28 U.S.C. § 2254(e). *Id.*

2. The decision by the court of appeals is unremarkable. The opinion below turns upon its own facts and it will affect few others, if anyone, besides respondent. The decision was correct as it relied on this Court's precedent.

It is important to note what petitioners challenge in their application to this Court. Petitioners did not take issue with the findings that respondent made a colorable claim of deficient performance of trial counsel under *Strickland* and that "counsel did little to prepare for the sentencing aspect of the case." *Landrigan*, 441 F.3d at 643.[4] Apx. A-10. Nor did they challenge the finding that "the initial investigation *did* reveal potential mitigating evidence, but that evidence was not developed." *Id.* 644. Apx. A-11. Also unchallenged is the finding that respondent made a colorable claim of prejudice, as well as the determination the allegations put forth by respondent, if true, were the very sort of mitigating evidence that demonstrates prejudice. *Id.* at 649-50. Apx. A-19-21. Finally, left alone is the finding by the court of appeals that respondent is entitled to an evidentiary hearing under 28 U.S.C. § 2254(e) as he "did not 'fail to develop' the factual basis for his ineffective assistance claim in state court." *Landrigan*, 441 F.3d at 642. Apx. A-8. At bottom, petitioners' only complaint is that respondent waived the presentation of mitigating evidence at the sentencing proceedings.

---

4. All eleven judges on the *en banc* panel agreed that the sentencing investigation by trial counsel was inadequate. *Landrigan*, 441 F.3d at 643-48; *see also id.* at 650 (Bea and Callahan, JJ., dissenting) (agreeing that "counsel's limited investigation of Landrigan's background fell below the standards of professional representation prevailing in 1990[.]"). Apx. A-12-17, 22.

a. With a broad brush, petitioners claim that the court of appeals exceeded its authority when it rejected the state courts' determination that respondent instructed his lawyer not to present mitigating evidence at the sentencing hearing.[5] Petition at 10. According to petitioners, the court of appeals exceeded its authority when it failed to defer to the state courts' factual finding. *Id.* at 17. Sandwiched between these two points are excerpts from the sentencing hearing. Without discussion of how the court of appeals exceeded its authority under 28 U.S.C. § 2254(d)(2), petitioners simply conclude that it did. Absent from petitioners' brief discussion is the fact that trial counsel failed to conduct an adequate investigation. "Indeed, due to his lawyer's meager investigation, there was no other mitigating evidence available to which Landrigan could object or not object." *Landrigan*, 441 F.3d at 646. Apx. A-15.

The court below carefully tracked 28 U.S.C. § 2254(d)(2) when it reviewed the findings by the state courts. Section 2254(d)(2) allows a federal court to look at state court findings to determine if there was "an unreasonable determination of the facts."

Applying section 2254(d)(2), the court of appeals held that the state courts' finding that respondent instructed his trial counsel not to present any mitigating evidence was an "unreasonable determination" of the facts because it was "an overly broad characterization" of what actually occurred and was not supported by the record. *Landrigan*, 441 F.3d at 647. Apx. A-16. In making this finding, the court of appeals did not stray beyond the confines of 28 U.S.C. § 2254(d)(2). Petitioners' complaint lies not with the way the court of appeals applied

5. Landrigan did not foreclose the possibility of investigation; rather, he simply directed counsel not to put two family members on the stand at sentencing. *Landrigan*, 441 F.3d at 645. Apx. A-12.

§ 2254(d)(2); rather, their disagreement is with the conclusion reached by the court below in applying the statute to the particular facts of respondent's case. This is not a reason for this Court to grant certiorari.

b. Petitioners next argue the court of appeals exceeded its authority under 28 U.S.C. § 2254(d)(1) when it found that the state supreme court's ruling was an unreasonable application of clearly established federal law. Petition at 17-18. Again, petitioners' sole focus is on respondent's purported waiver of the presentation of mitigating evidence at sentencing. Petitioners do not discuss why the opinion was unreasonable; they merely state, based on their review of the record, that they disagree with it.

The court below concluded that even if it overlooked the erroneous findings by the state courts, counsel's failure to conduct an adequate investigation prior to the sentencing hearing was not reasonable and could not be excused. *Landrigan*, 441 F.3d at 647 (discussing *Wiggins*, 539 U.S. at 522-23; *Terry Williams*, 529 U.S. at 396). Apx. A-16. The state courts' conclusion that respondent's claim was "'frivolous' and 'meritless' was an unreasonable application" of this Court's precedent. *Id.* (citing 28 U.S.C. § 2254(d)(1)).

Although defense counsel should consider and respect a client's wishes, *Strickland*, 466 U.S. at 688, the obligation to make a reasonable investigation into mitigation evidence is paramount. *Rompilla*, 125 S. Ct. 2466 (citing 1 ABA Standards for Criminal Justice 4-4.1 (2nd ed. 1980)) (finding a duty to investigate exists regardless of the client's desires). Therefore, regardless of the client's directions to the contrary, this Court's precedent mandates a reasonable investigation. *Wiggins*, 539 U.S. at 523. As such, the proper inquiry is the

reasonableness of counsel's investigation. *Id.* at 521-22 (citing *Strickland*, 466 U.S. at 690-91). Here, the opinion by the court of appeals is on all fours with this Court's precedent.

3. Petitioners' presentation of a circuit split is thin. Petitioners-cite two cases that purport to demonstrate the putative split. However, the cases fail to make petitioners' point. Respondent's situation is different from those of the appellants in *Wallace v. Ward*, 191 F.3d 1235 (10th Cir. 1999), and *Mitchell v. Kemp*, 762 F.2d 886 (11th Cir. 1985).

a. The facts of *Wallace* are inapposite to respondent's case. In *Wallace*, appellant pled guilty to two counts of first degree murder. As the only defense witness at the punishment trial, appellant testified that "he instructed counsel not to cross-examine witnesses or to object to the evidence because his goal was to obtain the death penalty." 191 F.3d at 1248. At the sentencing hearing, Wallace again confirmed that he waived investigation and presentation of mitigating evidence after conferring with counsel. *Id.* at 1247. The Tenth Circuit upheld the denial of appellant's ineffective assistance of counsel claim based "on the unique facts of [the] case," as "the record show[ed] petitioner was absolutely determined to plead guilty and to obtain the death penalty." *Id.* at 1248. Here, in contrast, there is nothing in the record to indicate respondent limited counsel in his investigation in any way or instructed counsel not to put on *any* mitigating evidence at sentencing. Thus, *Wallace* cannot be held up as an example of a circuit split on the issue of waiver of mitigation.

b. Petitioners also claim *Mitchell* provides evidence of a circuit split, but again the facts and circumstances of that case are distinguishable from respondent's case. In *Mitchell*, the appellant pled guilty and a sentencing trial, where no mitigating evidence was offered was, held before a judge.

762 F.2d at 887. On appeal, Mitchell raised a claim of ineffective assistance of counsel based upon the trial attorney's failure to conduct any mitigation investigation. *Id.* at 888. The Eleventh Circuit upheld the denial of Mitchell's ineffective assistance of counsel claim based upon the detailed record provided at both the *state* and *federal* evidentiary hearings. *Id.* Further, despite the fact that Mitchell discouraged his attorney from contacting his family, the attorney—unlike respondent's trial counsel in this case—"questioned Mitchell in detail about his background," and "telephoned Mitchell's father." *Id.* at 888-89. As the Eleventh Circuit noted, "[i]t is important to note that Mitchell's attorney did not blindly follow Mitchell's command to leave his family out of it." *Id.* at 890.

Petitioners fail to point out that in *Mitchell* both the state and federal courts conducted an evidentiary hearing on the claim of ineffective assistance of counsel. The record was fully developed. Here, respondent's requests for hearings in the state court and the district court were denied and, through no fault of respondent, the record on the claim was not developed. The court of appeals simply remanded the case to the district court so a hearing could be held and so that the issue can be decided based upon a full record.

c. In *Terry Williams*, the petitioner voluntarily confessed and Williams' counsel failed to investigate mitigating factors. 529 U.S. at 396. The Court described the consequences of that approach in no uncertain terms: "the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession." *Id.* The Court went on to say, "[w]hether or not those omissions were sufficiently prejudicial to have affected the outcome of

sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." *Id.* (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980)).

In *Wiggins*, the Court was even more plainspoken: "In light of [the ABA for Criminal Justice] standards, our principal concern in deciding whether [counsel] exercised 'reasonable professional judgment[]' . . . is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable*." 539 U.S. at 522-23 (alterations and citations omitted). A decision by counsel to forego investigation is not reasonable. Even if respondent had thwarted counsel's investigation attempts, this Court's jurisprudence and professional standards nevertheless obligated counsel to conduct a reasonable investigation.

Under *Terry Williams*, *Wiggins* and *Rompilla*, counsel was required to investigate. *Wallace* and *Mitchell* do not lend support to petitioners' argument.

CONCLUSION

For these reasons, this Court should deny the petition for writ of certiorari.

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No. 05-1575

FILED
AUG 3 0 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO, et al.,

Petitioners,

VS.

JEFFREY TIMOTHY LANDRIGAN, a.k.a.
BILLY PATRICK WAYNE HILL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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CAPITAL CASE

QUESTIONS PRESENTED

Respondent Jeffrey Landrigan actively thwarted his attorney's efforts to develop and present mitigation evidence in his capital sentencing proceeding. Landrigan told the trial judge that he did not want his attorney to present any mitigation evidence, including proposed testimony from witnesses whom his attorney had subpoenaed to testify. On post-conviction review, the state court rejected as frivolous an ineffective assistance of counsel claim in which Landrigan asserted that if counsel had raised the issue of Landrigan's alleged genetic predisposition to violence, he would have cooperated in presenting that type of evidence.

1. In light of the highly deferential standard of review required in this case pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), did the Ninth Circuit err by holding that the state court unreasonably determined the facts when it found that Landrigan "instructed his attorney not to present any mitigating evidence at the sentencing hearing"?

2. Did the Ninth Circuit err by finding that the state court's analysis of Landrigan's ineffective assistance of counsel claim was objectively unreasonable under *Strickland v. Washington*, 466 U.S. 668 (1984), notwithstanding the absence of any contrary authority from this Court in cases in which (a) the defendant waives presentation of mitigation and impedes counsel's attempts to do so, or (b) the evidence the defendant subsequently claims should have been presented is not mitigating?

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STATEMENT OF THE CASE

Petitioners rely on the Statement of the Case set forth in the Petition for Writ of Certiorari.

REASONS WHY THE WRIT SHOULD BE GRANTED

Landrigan's characterization of this case as "unremarkable" and one that "will affect few others" (Brief in Opposition, at 5) is simply wrong. Instead, this case provides an extraordinary example of a federal court's failure to properly accord deference under the AEDPA to state court factual findings and state court interpretations of federal law as determined by this Court. This case also presents a question of nationwide significance regarding the extent of defense counsel's obligation to develop and present mitigation when a defendant actively thwarts counsel's efforts to do so.

The Ninth Circuit's en banc ruling eviscerates the deference standard set forth in 28 U.S.C. § 2254. There was nothing unreasonable about the state courts' factual determination that Landrigan instructed his attorney not to present any evidence at the sentencing hearing. Nor was there anything unreasonable about the state courts' application of this Court's *Strickland* jurisprudence. Accordingly, the Ninth Circuit's ruling should be reversed.

I. *The Ninth Circuit Clearly Erred by Rejecting The State Courts' Factual Finding That Landrigan Instructed His Defense Attorney Not To Present Any Mitigating Evidence.*

Under 28 U.S.C. § 2254(d)(2), a federal habeas petitioner must demonstrate that the state court's adjudication of the merits resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by this Court, or resulted in a decision that was based on an unreasonable determination of the facts. *See Lockyer v. Andrade*, 538 U.S. 63, 70-73 (2003); *Bell v. Cone*, 535 U.S. 685, 693-95

(2002). Factual determinations by a state court are presumed correct, and the habeas petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

In the instant case, the state courts' factual conclusion that Landrigan instructed his counsel not to present any mitigation is clearly supported by the record and was not unreasonable. The Ninth Circuit's decision to the contrary is belied by the assessment of every other court that has considered the issue. The state trial court, the Arizona Supreme Court, the Federal District Court for the District of Arizona and the Ninth Circuit panel that originally considered this case all reached a different conclusion. The Ninth Circuit panel in fact noted that this is not a close case regarding the reasonableness of the state court's factual determination that Landrigan waived presentation of mitigation:

> In the constellation of refusals to have mitigating evidence presented . . . this case is surely a bright star. No other case could illuminate the state of the client's mind and the nature of counsel's dilemma quite as brightly as this one. No flashes of insight could be more fulgurous than those which this record supplies.

Landrigan v. Schriro, 272 F.3d 1221, 1226 (9th Cir. 2001). That assessment, consistent with the state court's ruling, is clearly supported by the record.

Landrigan argues that the State's "broad brush" claim is simply conclusory. (Brief in Opposition, at 6.) Landrigan further argues that he did "not foreclose the possibility of investigation; rather, he simply directed counsel not to put two family members on the stand at sentencing." (*Id* n.5.) That assertion, however, is belied by the record.

At the sentencing hearing, Landrigan's attorney had subpoened Landrigan's mother and his ex-wife to testify on Landrigan's behalf. Landrigan not only ordered that they not testify, he actively thwarted his attorney's efforts to make a record of the type of information he was seeking to develop, including testimony from a mental health expert. (Appendix D, R.T. Oct. 25, 1990, at 7–22.) Landrigan's attorney was not one of Landrigan's family members. Yet Landrigan repeatedly interrupted and made derisive comments when Landrigan's counsel attempted to put information into the record. *See, e.g.*, (Appendix B, 272 F.3d at 1226-27) ("I mean, you, he's not getting the story straight. Why have him tell somebody else's story in the first f—ing place?") Thus, Landrigan's assertion that he "simply directed counsel not to put two family members on the stand at sentencing" is unsupportable.

Finally, Landrigan's argument ignores the fact that he bears the burden of proving by clear and convincing evidence that the state courts' factual determination--that he instructed his attorney not to present mitigation evidence--was objectively unreasonable. Landrigan has not presented any evidence contradicting that finding, let alone evidence meeting the clear and convincing standard. Thus, the Ninth Circuit clearly erred by failing to accord deference to the state court's factual finding regarding this issue.

II. *The Ninth Circuit Exceeded Its Authority Under The AEDPA When It Found That The State Court's Ruling Was An Unreasonable Application of Clearly Established Federal Law.*

Noticeably absent from Landrigan's response is any discussion of this Court's opinion in *Blystone v. Pennsylvania*, 494 U.S. 299, 306 n.4 (1990) (affirming death sentence where "[a]fter receiving repeated warnings from the trial judge, and contrary advice from his counsel, petitioner decided not to present any . . . mitigating evidence.") Under *Blystone*, it is clear that the Constitution does not prohibit a defendant in a capital case from waiving presentation of mitigation evidence.

Blystone is significant because this Court held in *Strickland* that "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions, . . . and must be evaluated in light of 'informed strategic choices made by the defendant and on information supplied by the defendant.'" 466 U.S. at 691. The Ninth Circuit's en banc ruling ignores that principle and should be reversed by this Court.

Landrigan incorrectly asserts that Petitioners have not challenged the finding of a colorable claim of prejudice under *Strickland*. The certiorari petition explains that the same judge who sentenced Landrigan considered and rejected Landrigan's post-conviction claim of ineffective assistance of counsel, holding that it was both frivolous and precluded. (Appendix F, Order dated July 17, 1995, at 3-4.) The judge noted that Landrigan had expressly waived presentation of *any* mitigation, and that Landrigan's "statements at sentencing belie his new-found sense of cooperation." *Id.* This finding, which was entitled to deference under the AEDPA standard of review, illustrates that Landrigan failed to establish a colorable claim of prejudice.

Furthermore, the only evidence Landrigan has ever said he would have presented at sentencing was evidence that he had a genetic propensity to violence. Petitioners have never disputed that Landrigan has a propensity to violence. They have disputed, however, that such a propensity is mitigating. Petitioners argued in the certiorari petition that the state courts' rejection of Landrigan's *Strickland* claim was not objectively unreasonable given the fact that "the evidence at issue would not have been presented because of Landrigan's unwillingness to present mitigation and because it is only marginally—if at all—mitigating." (Petition at 20.) Thus, Petitioners have repeatedly contested Landrigan's assertion that he established a colorable claim for relief on his claim of ineffective assistance of counsel.

Petitioners further pointed out in their certiorari petition that

the Arizona courts have repeatedly held that a personality disorder, standing alone, is not entitled to any mitigating weight. *See State v. Gerlaugh*, 698 P.2d 694, 704 (Ariz. 1985) (an antisocial personality disorder is not entitled to any mitigating weight absent "some reason other than the nature of the disorder."). (Petition, at 21.) Thus, the new evidence Landrigan has attempted to proffer simply confirms that he has a personality disorder. Evidence that Landrigan is a violent sociopath was clearly established by Landrigan's criminal history and by his statements at the time of sentencing. Additional evidence to that effect would not have aided Landrigan's case, and he has not established even a colorable claim of ineffective assistance of counsel.

As noted in the Petition, the Tenth and Eleventh Circuits have rejected claims similar to Landrigan's claim. *See Wallace v. Ward*, 191 F.3d 1235 (10th Cir. 1999), *Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir. 1985). Recently, the Sixth Circuit similarly rejected such a claim. In *Keith v. Mitchell*, ___ F.3d ___, 2006 WL 1879646 (6th Cir. 7/10/06), the court rejected Keith's claim that his attorney acted ineffectively by failing to present mitigation because Keith failed to show prejudice, "and because an otherwise constitutionally ineffective strategy is not a grounds for habeas relief if the client knowingly directed the strategy." *Id.* at * 8. The Ninth Circuit's analysis of Landrigan's *Strickland* claim conflicts with those rulings.

CONCLUSION

This case is an extreme example of the Ninth Circuit's failure to accord deference to state court factual findings and applications of this Court's *Strickland* jurisprudence. Landrigan expressly waived presentation of mitigation and actively thwarted his attorney's attempt to put any type of mitigating evidence in the record. Landrigan's belated claim that he would have allowed his attorney to present evidence that he was genetically predisposed to violence does not establish even a colorable claim of ineffective assistance of counsel, much less a basis for challenging (under the AEDPA deference standard) the state courts' denial of the claim. The Ninth

Circuit's analysis of Landrigan's *Strickland* claim conflicts with rulings from this Court and from other circuits. This Court should grant review to resolve these conflicts and enforce its holdings.

Respectfully submitted,

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No. 05-1575

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

DORA B. SCHRIRO, ET AL.,

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vs.

JEFFREY TIMOTHY LANDRIGAN,
a.k.a. BILLY PATRICK WAYNE HILL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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Petition For Certiorari Filed June 6, 2006
Certiorari Granted September 26, 2006

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RELEVANT DOCKET ENTRIES OF THE SUPERIOR COURT OF ARIZONA IN MARICOPA COUNTY

Case No.: CR1990-000066-A

January 2, 1990	Indictment
February 27, 1990	Notice of Intent to Seek the Death Penalty
June 28, 1990	Verdict
June 28, 1990	Verdict
June 28, 1990	Verdict
June 28, 1990	Verdict
June 28, 1990	Verdict
June 28, 1990	Verdict
October 19, 1990	Response to State's Sentencing Memorandum
October 19, 1990	Note: Concerning Mitigation 13-703(G)
January 31, 1995	PCR – Post Conviction Relief
July 20, 1995	ME: Ruling
July 31, 1995	Motion for Rehearing of Dismissal of Post-Conviction Relief Petition
September 14, 1995	Ruling
October 5, 1995	Petition for Review

RELEVANT DOCKET ENTRIES OF THE ARIZONA SUPREME COURT

Case No.: CR-90-0323-AP

November 1, 1990	Notice of Appeal From Superior Court
September 16, 1991	Appellant's Opening Brief
October 11, 1991	Appellee's Answering Brief
February 25, 1993	Opinion
March 12, 1993	Motion for Reconsideration
April 13, 1993	Motion for Reconsideration = Denied
December 1, 1993	Mandate

RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Case No.: 2:96-cv-02367-ROS

October 16, 1996	Petition for Writ of Habeas Corpus
December 15, 1999	Order Dismissing With Prejudice the Habeas Corpus Petition
March 1, 2000	Notice of Appeal

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Docket No.: 00-99011

November 8, 2001	Argued and Submitted
November 28, 2001	Filed Opinion: Affirmed
February 14, 2005	Filed order that case be reheard en banc
March 24, 2005	Argued and Submitted
March 8, 2006	Filed Opinion: Affirmed in Part, Reversed in Part, and Remanded
June 16, 2006	Received Notice from Supreme Court: Petition for Certiorari Filed
October 3, 2006	Received Notice from Supreme Court, Petition for Certiorari Granted

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA, Plaintiff, vs. JEFFREY TIMOTHY LANDRIGAN, Defendant.	)	No. CR 90-00066 CR-90-0323-AP

Phoenix, Arizona
May 1, 1990

BEFORE: The Honorable CHERYL K. HENDRIX

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Copy Prepared for Appeal

By: Pauline Wood
Official Court Reporter

* * *

[34] Q I'm sorry. Please explain.

A Well, the man was in jail for a City of Phoenix Police Department charge of a stolen vehicle situation. It is routine Phoenix Police Department procedure at the time of booking to obtain what is referred to as major case fingerprints. As I had spoken to him in custody and knew he was there for a Phoenix Police arrest, fingerprints obviously of his were on file. So the previous 10 days' request was a clerical error of some type.

Q In any event, a fingerprint comparison was eventually done?

A Yes, it was.

Q Were any of the latent fingerprints discovered at the crime scene matched to the Defendant?

A Several.

Q At what point did the – well, let me ask it a different way.

Did you at some time arrest Mr. Page for the death or murder of Chester Dyer?

A I told Mr. Landrigan before leaving him that I would charge him with second degree murder in the death of Chester Dyer, and I did so at that time. That's referred to as Page 2 to a booking.

Q So following your interview with Mr. Dyer (sic) is when you placed him under arrest and booked him on the charge of murder in the second degree?

* * *

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	No. CR 90-00066
	)	CR-90-0323-AP
vs.	)	
	)	
JEFFREY TIMOTHY LANDRIGAN,	)	
	)	
Defendant.	)	

Phoenix, Arizona
June 18, 1990
6:10 p.m.

BEFORE: The Honorable CHERYL K. HENDRIX

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Copy
Prepared for Appeal

By: Pauline Wood
Official Court Reporter

* * *

[9] THE COURT: The bailiff has a supply, I think, of little forms he signs on my behalf to verify that you have been here on such and such days. And when we are not in session, for those who are employed, you should go get reacquainted with your employer.

All right?

Ladies and Gentlemen, you are excused for the evening. Thank you for whatever patience you have demonstrated. I know it's been a long day for you. Have a good evening. We will see you at 1:15 tomorrow.

(The jurors left the courtroom for the evening recess.)

THE COURT: Mr. Farrell, I believe you indicated that you would like to put on the record the offers that have been made by the State and rejected by you and your client.

MR. FARRELL: Yes, Your Honor. So the record is clear, it's – so the record will reflect that the State as well as myself have had some attempt at some agreements concerning a possible plea in this particular case, there was an offer made by the State to my client of second degree murder with the stipulated 20-year sentence. That was rejected by my client.

And the latest offer, I believe, which has since been rejected by my client, was an offer of second degree murder with priors. The sentencing range in that case is anywhere from 15 years up to 25 years. That would have been left to the discretion of the Court. And that's been rejected by my client.

* * *

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
Plaintiff,	)	
	)	No. CR 90-00066
vs.	)	
JEFFREY TIMOTHY LANDRIGAN,	)	
Defendant.	)	

Phoenix, Arizona
July 24, 1990

BEFORE: The Honorable CHERYL K. HENDRIX

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Copy

Pauline Wood
Official Court Reporter

* * *

[7] July 24, 1990 THE COURT: CR 90-00066, State of Arizona against Jeffrey Timothy Landrigan. This is the time set for hearing defendant's motion to continue the presentence hearing and sentencing set for this coming Friday.

MR. SANDLER: Jeff Sandler on behalf of the State.

MR. FARRELL: Dennis Farrell on behalf of the defendant, who is present in custody, Your Honor.

At this time I would be asking the Court for a 30-day continuance. Quite a bit of information is still being requested concerning the background of my client and we

need additional time to obtain that information in order to proceed with the sentencing aspect of my client's case.

THE COURT: I can't give you 30 days. That falls on a Sunday, from today – from Friday.

MR. FARRELL: Then perhaps the Friday before the Sunday, Your Honor?

THE COURT: State's position?

MR. SANDLER: Is that August 24th we are talking about?

THE COURT: I think so.

MR. SANDLER: That's fine.

THE COURT: Mr. Landrigan?

THE DEFENDANT: That's fine with me.

* * *

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
Plaintiff,	)	
	)	No. CR 90-00066
vs.	)	CR-90-0323-AP
JEFFREY TIMOTHY LANDRIGAN,	)	
Defendant.	)	

Phoenix, Arizona
August 24, 1990

BEFORE: The Honorable CHERYL K. HENDRIX

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Copy Prepared for Appeal

By: Pauline Wood
Official Court Reporter

* * *

[12] THE COURT: Do you have any certified documents?

MR. SANDLER: They were previously admitted at trial.

THE COURT: All right.

Mr. Farrell, do you have anything in mitigation you would like to present at this time?

MR. FARRELL: Your Honor, not at this particular time. As I stated in my motion, I'm still awaiting hospital records. In the presentation of mitigating factors, rather than presenting it piecemeal, I wish to present it all at one time.

THE COURT: When?

MR. FARRELL: Your Honor, at this particular time I'm sorry about the delay. As I have already advised the Court, I sent for these documents three-and-a-half months ago. A letter – letters were sent out on May 3rd. Not having received it by August 23rd, it shows the hospitals are not very prompt or considerate. I have talked with the hospital that I'm awaiting all of the medical records. They have been having some problem getting copies because it's on microfiche. I talked with them last week and they are making every effort to send them to me as soon as possible. However, as soon as possible for hospitals. I have no idea how long it will take them. I'm making every effort. If given a [13] 30-day continuance at this time to make sure I have all of those records, I will be able to proceed at that particular time.

THE COURT: Do you want to do it Monday, the 24th, or Tuesday, the 25th? That will make it 31 days, I guess, or 32.

MR. FARRELL: Would that be in the afternoon, Your Honor?

THE COURT: Yes.

MR. FARRELL: Perhaps Tuesday, the 25th.

MR. SANDLER: I think that's okay, Judge. I'm supposed to start a trial in front of Judge Howe on the 24th. I don't believe that that's really going to happen, though.

THE COURT: Mr. Landrigan, do you have any objections to a 32-day continuance?

THE DEFENDANT: No.

THE COURT: Then it's ordered continuing this hearing until Tuesday, September 25th, at 1:30 in the afternoon.

Mr. Farrell, do you have any guesstimate at this point in time how long the hearing might take?

The Court assumes by your silence you do not. That's fine.

Thank you, gentlemen. We stand at recess.

Mr. Farrell, is there any chance I could get [14] a presentence memorandum?

MR. FARRELL: Yes, Your Honor, with any additional factors that are mitigating from the hospital I may include in a separate supplemental memorandum.

THE COURT: Thank you.

(The proceedings were concluded.)

IN THE SUPERIOR COURT OF
THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	No. CR 90-00066
	)	
vs.	)	
	)	
JEFFREY TIMOTHY LANDRIGAN,	)	
	)	
Defendant.	)	

Phoenix, Arizona
September 25, 1990

BEFORE: The Honorable CHERYL K. HENDRIX

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Copy

Pauline Wood
Official Court Reporter

* * *

[9] September 25, 1990 THE COURT: CR 90-00066, State of Arizona against Jeffrey Timothy Landrigan. At 1:30 was to be the time set for sentencing and presentence hearing. I have received a motion to continue.

MR. SANDLER: Jeff Sandler appearing for the State.

MR. FARRELL: Dennis Farrell on behalf of the defendant, who is present in custody, Your Honor.

Your Honor, I asked for a continuance because again there was a delay in seeking vital hospital records. I have received those records, which are somewhat extensive, over a hundred pages of typewritten material that I

received last night. Consequently, I would be asking for a 30-day continuance in order to accumulate all the information that I have received to incorporate in the sentencing memorandum on behalf of my client.

THE COURT: Is that all right with you, Mr. Landrigan?

THE DEFENDANT: Yeah.

THE COURT: Any objection from the State?

MR. SANDLER: No, Your Honor.

THE COURT: It's ordered – is the 25th of October in the afternoon okay?

MR. SANDLER: That's fine.

MR. FARRELL: That will be fine, Your Honor.

* * *

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IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

STATE OF ARIZONA,	) No. CR-90-00066
Plaintiff,	) DEFENDANT'S SENTENCING MEMORANDUM CONCERNING MITIGATION ARS §13-703(G)
v.	
JEFFEREY* LANDRIGAN,	
Defendant.	) (Filed Oct. 19, 1990)
	) Assigned to the Hon. CHERYL K. HENDRIX

Defendant by and through counsel undersigned, takes this opportunity to point out different legal and factual considerations which he believes are relevant to the Court's decision on a mitigated sentence in this case. We fully recognize the Court heard the testimony at the trial, and we will attempt to show only those facts necessary for

* Any typographical, grammatical, and/or incorrect punctuation found in the Joint Appendix were intentionally left to show how the original document actually appeared.

this purpose. What we, also, will do is point those legal arguments which we believe are critical in this case.

ARS §13-703(G) reads in part:

> "G. Mitigating circumstances shall be any factors proffered by the defendant or the State which are relevant in determining whether to impose a sentence less than death, including any aspect of the defendant's character, propensities or record of any of the circumstances of the offense . . . "

The Court has the power to differentiate among offenders with a view to individualize their treatment and to safeguard the offender against excessive, disproportionate or arbitrary punishment. What is important at the sentence selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime. *Zant v. Stephens*, 462, U.S. 862, 879, 103 S.Ct. 2733, 2743, 77 L.Ed.2d 235, (1983).

The Supreme Court has previously recognized that "[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances and the offense together with the character and propensities of the offender." *Pennsylvania ex rel. Sullivan v. Ash* 302 U.S. 51 55, 58 S.Ct. 59, 60, 82 L.Ed. 43 (1937).

Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as progressive and humanizing development. The prevailing practice of individualizing sentencing determinations generally reflects not only an enlightened policy, but also the constitutionally indispensable part of the process of inflicting the ultimate penalty. *Woodson v. North*

Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976).

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, *but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death*, *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). These principles were reaffirmed by the Supreme Court in *California v. Brown*, ___ U.S. ___, 107 S.Ct. 837 (1988).

The *ABA Standards Relating to Sentencing Alternatives and Procedures* states:

> "The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant."

We direct the Court's attention to two federal cases:

First, *United States v. Wardlaw*, 576 F.2d 932 (1978) where the Court stated:

> "Sentences dictated by a 'mechanistic' concept of what a particular type of crime invariably deserves have been held to fall within this exception: a judge holding such fixed ideas is presumably closed to individual mitigating factors." 576 F.2d at 538.

* * *

> "The Court's duty to 'individualize' the sentence simply means that, whatever, the judge's thoughts as to the deterrent value of a jail sentence, he must in every case reexamine and measure that view against the relevant facts and other important goals such as the offender's rehabilitation. Having done so, the district judge must finally decide what factors, or mix of factors, carry the day. While the judge's conclusions as to the deterrence may never be so unbending as to forbid relaxation in an appropriate case, they may nonetheless on occasion justify confinement although other factors point in another direction." 576 F.2d at 538.

The second case, *United States v. Barker*, 771, F.2d 1362 (9th Cir. 1985), where again the Ninth Circuit Court of Appeals reaffirmed that a criminal sentence must reflect an individualized assessment of an individual defendant's culpability rather than a mechanistic application of a given sentence to a given category of crime. The Court stated in this regard:

> "[P]unishment should fit the offender and not merely the crime. the belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. The sentencing judge is required to consider all mitigating and aggravating circumstances involved. There is a strong public interest in the imposition of a sentence based upon an accurate evaluation of the particular offender and designed to aid in his personal rehabilitation. Thus, appellate courts have vacated sentences reflecting a preconceived policy always to impose the maximum penalty for a certain crime." 771 F.2d at 1365.

In this case, the sentencing memorandum of the State is a superficial report with no specific facts about the defendant which would aid the Court in making an accurate evaluation. There is no indication that the County Attorney seriously considered any facts in mitigation. In light of this, we refer the Court, again, to the *Barker* case of the doctrine of "General Deterrence".

> "Nevertheless, deterrence as a sentencing rationale is subject to limitation. Tailoring punishment to the individual criminal may reduce the efficacy of deterrence, but that reduction is an inevitable cost of a system that eschews mechanistic punishment. General deterrence is a legitimate aim, but it has never been the sole aim in imposing sentence." 771 F.2d at 1368.

A sentencer may not refuse to consider or preclude from consideration any relevant mitigating evidence, including non-statutory circumstances. *Hitchcock v. Dugger*, 481 U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). Under ARS §13-703, a trial court is not free to disregard any mitigating factor. This includes any aspect of a defendant's character or record that is offered as a basis for a sentence less than death. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1987); *Eddings v. Oklahoma*, 445 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). If a court does, it violates a defendant's rights under the Eighth and Fourteenth Amendment to the United States Constitution. *State v. Smith*, 136 Ariz. 273, 655 P.2d 995 (1983). This ensures that the death penalty is not imposed despite factors that may call for a less severe penalty. *State v. McMurtrey*, 136 Ariz. 93, 664 P.2d 637 *cert. den.*, 464 U.S. 858, 104 S.Ct. 180, 78 L.Ed.2d 161 *appeal after remand* 143 Ariz. 71, 691

P.2d 1099 (1983) *cert. den.*, 107 S.Ct. 1359 (1984). *See also, State v. McCall*, 139 Ariz. 147, 677 P.2d 920 *cert. den.*, 467 U.S. 1220, 104 S.Ct. 2670, 81 L.Ed.2d 375 (1983); *State v. McDaniel, supra.*

The defendant raises the following aspects of his character, propensities, record, and the following circumstances of the offense, as mitigating evidence sufficiently substantial to call for leniency:

1. The Defendant's Conduct While incarcerated and his Conduct During Trial.

The Maricopa County Sheriff's Department has had no difficulties of any kind with the defendant. During trial, the defendant's demeanor was respectful, proper and controlled. He conducted himself while under extreme stress, in a composed and dignified manner.

A person's behavior is relevant evidence in mitigation of punishment. *State v. Watson*, 129 Ariz. 60, 629 P.2d 943 (1981); *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986).

2. Defendant's State of Intoxication, ARS §13-703(G)(1).

The testimony at trial indicated that the victim invited the defendant to his apartment and while at the apartment both the victim and the defendant drank quite a bit as well as smoked marijuana and did drugs. The defendant, Mr. Jeffrey Landrigan, has a long history of substance abuse concerning alcohol as well as drugs. As part of the evidence presented to this to Court to consider mitigation there are two exhibits labeled Exhibit A and

Exhibit B. Each of those Exhibits are partial medical records of the defendant for his substance abuse while as a teenager. Exhibit A are part of the medical records from the Jane Phillips Episcopal Memorial Medical Center and they concern the defendant, Jeffrey Landrigan, when he was admitted in February of 1977 at the age of fourteen. This report additionally points out the fact that Jeffrey Landrigan had been smoking marijuana excessively since the ninth grade. The report goes on to advise the doctors that he had recently begun taking Quaaludes.

Exhibit B involves the defendant being admitted to Saint John's Medical Center in Tulsa, Oklahoma, in July of 1979. At that time the defendant was seventeen. He was admitted to the Medical Center and remained there for over a month. At that time he was diagnosed as an alcoholic and he was specifically treated at the Alcohol Treatment Program. The report goes on to state that the defendant had a history of very severe alcoholism dating back, at least, six months prior to his admission to the hospital. These reports revealed that Jeffrey revealed to the Doctors that he started drinking heavily at the age of thirteen. Additionally, these medical reports reveal that Jeffrey suffered from blackouts and that Jeffrey attempted to get drunk, whenever he drank. And that he attempted to get high on whatever mood-altering chemical was available to him.

From the medical records it appears that the defendant has been suffering from a substance abuse problem since the age of fourteen. The defendant's acute alcohol intoxication history, as well as his intoxication on the night the victim was killed, substantially impaired the defendant's ability to appreciate the wrongfulness of his conduct. As such, it should be found to be a mitigating

circumstance sufficiently substantial to call for leniency. *State v. Gilles*, 142 Ariz. 564, 571, 691 P.2d 655, 662 (1984). *State v. Wood*, 648 P.2d 71, (Utah 1978); *Burrows v. State*, 640 P.2d 533 (Oklahoma 1982).

3. The Defendant's Ability to Appreciate the Wrongfulness of his Conduct was Substantially Impaired, ARS §13-703(G)(1).

The defendant has presented evidence of a long history of substance abuse. This evidence is documented by both of the Exhibits that are attached to this Memorandum concerning the defendant's substance abuse starting at the age of fourteen. These hospital documents further substantiate that the defendant, at the age of seventeen, suffered from blackouts. These medical reports further advise that the defendant, even at the age of seventeen, confessed to the doctors that when he did drink, he drank excessively in order to get drunk. Or if he was taking drugs, he would take whatever mood-altering drugs were available in order to get high. The evidence at trial, again, showed the defendant as well as the victim were engaging in drinking alcohol as well as doing drugs. These medical reports clearly show that for the past fifteen years the defendant has had a very serious substance abuse problem that continues to plague him. The defendant's inability to appreciate any wrongfulness of his conduct based on his intoxication and his ability to conform his conduct to the requirements of the law, would have been a complete defense. However, the voluntary intoxication by the defendant made a defense of insanity unavailable to the defendant.

In terms of mitigation there is no question that his capacity was significantly impaired. In this regard, the

defendant points out four cases where the court has found substantial impairment.

First, *State v. Doss*, 116 Ariz. 156, 568 P.2d 1054 (1977). The Court found the mental condition of the defendant, which was induced by voluntary consumption of alcohol, significantly impaired his capacity and therefore, was a mitigating circumstance sufficiently substantial to call for leniency.

In *State v. Brookover*, 124 Ariz. 38, 601 P.2d 1322 (1979), the court found that the defendant suffered from a substantial mental impairment due to brain lesions and reduced a death sentence to life imprisonment.

In *State v. Graham*, 135 Ariz. 209, 660 P.2d 460 (1983), the court found substantial mental impairment due to drug addiction, neurological problems, vulnerability to influence, and a lack of prior record of violence to be factors which called for leniency.

Finally, *State v. Stevens*, 158 Ariz. 595, 764 P.2d 724 (1988), the court found the defendant, due to drugs and alcohol use, was substantially impaired and reduced a death sentence to life imprisonment.

Considering all of these factors we submit that the Court find this condition of defendant to be sufficiently substantial to call for leniency as did the Supreme Court in *Stevens*.

4. Evidence of a Difficult Family History.

As the Court became aware during trial, through the testimony of Mrs. Gibson, the defendant was given up for adoption by his natural mother at the age of only a few

months. It is anticipated that Mrs. Gibson will also testify at the mitigation hearing to give additional aspects concerning her pregnancy and some significant factors for the Court to consider concerning the defendant's prenatal medical condition. The defendant was then adopted by Mr. and Mrs. Landrigan. As is pointed out in each of the Exhibits attached to this Memorandum, the defendant considered his adoptive mother an excessive alcoholic. He described her as coming home from work every day and starting to drink whiskey at five o'clock. The defendant further confided to the doctors that his mother was a strong disciplinarian and would slap and beat him very frequently for any kind of misconduct on his part. In fact, as documented in Exhibit A, the defendant started running away from home at the age of fourteen. The Court should consider evidence of the turbulent family history of the defendant as mitigation. *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

5. Love of Family.

As anticipated in the mitigation hearing the Court will hear from relatives of the defendant expressing their feelings and love for him. He also loves them. In *State v. Carriger*, 692 P.2d at 1011, the court found the love of the defendant's family for him and his love for them a mitigating factor.

6. No Evidence of Premeditation.

As the Court is aware, the defendant was convicted of felony murder. There was no evidence at trial that this murder was premeditated. In fact, the testimony of Detective Chambers, who was the investigating officer, indicated that

it was probably the victim's unwarranted homosexual advances that precipitated the argument leading to his death.

7. Cumulative Effect of all of the Above Mitigating Circumstances.

In *State v. Correll,* 148 Ariz. 468, 715 P.2d 721 (1985), this Court stated that mitigating circumstances will be considered individually and "in combination". Here, the weight of all of the factors in combination clearly would bring the mitigating evidence above the "Plimsoll Line" where is its sufficiently substantial to call for leniency. The finding of no mitigating factors would be an abuse of the trial court's discretion. That abuse violates the defendant's Eight and Fourteenth Amendment rights to the United State's Constitution and Article 2, Sections 1, 4 and 15 of the Arizona Constitution. *See also, Mills v. Maryland,* ___ U.S. ___, 108, S.Ct. 1860. Also, *State v. Rockwell*, 36 Ariz. Adv. Rep. 17 (1989).

PROPORTIONALITY REVIEW

In deciding whether to impose the death penalty, the Court in addition to finding aggravation-mitigation, the Court must also decide "whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant." *State v. Richmond*, 560 P.2d 41, 51 (1976) *cert. den.* 433 U.S. 915 (1977).

Proportionality review is distinct from the review of aggravating and mitigating review assesses whether the

death sentence is proportional in comparison to the offense. In contrast, the proportionality review occurs in cases where the sentence is not disproportionate to the crime but may be disproportionate to the sentence given other defendants.

In this case we ask the Court to compare the following cases with the defendant's case. First, we ask the Court to compare cases where the Supreme Court affirmed the death penalty. Both cases arise out of Maricopa County.

***State v. Beaty*, 158 Ariz. 232, 762, P.2d 519 (1988).**

The defendant was convicted of one count of First Degree Murder and Sexual Assault of a 13-year-old female newscarrier.

State v. Fulminante*, *11 Ariz. Adv. Rep. 7 (1988).

Later reversed on other grounds, 38 Ariz. Adv. Rep. 16)

The Defendant was convicted of one count of First Degree Murder of his stepdaughter. His stepdaughter had been shot twice at close range. There was also evidence that he choked her, sexually assaulted her, and made her beg for her life.

Next, the Court should look at two cases where the Supreme Court vacated death sentences and sentenced the defendant to life imprisonment.

***State v. Stevens*, *supra*.**

The Court vacated a sentence with an aggravated factor of pecuniary gain and a mitigating factor of impaired mental capacity.

State v. Rockwell, supra.

The Court vacated a sentence with an aggravating factor of pecuniary gain and mitigating factors of the defendant's character and back ground, his age and the unique circumstances of his conviction.

Next, we should ask the Court to look at two cases in Maricopa County where the trial court, despite finding of aggravating circumstances, sentenced the defendant to life imprisonment because the court found the mitigating circumstances were substantially sufficient to call for leniency.

***State v. Corey Tilden*, CR-87-11506 before Judge Gloria Ybarra.**

There, as here, there was a double homicide of two elderly people in North Phoenix. It was for pecuniary gain. However, the Court found that mental impairment of Corey Tilden and his turbulent childhood were sufficiently substantial to call for leniency.

***State v. James Lee White*, CR-148926, (1986) before Judge Stanley Goodfarb.**

There, the defendant was convicted of two counts of First Degree Murder of two dancers. There, the court found the aggravating factors were substantially outweighed by the mitigating circumstances of the defendant's background and the trial court sentenced on two *concurrent* life sentences.

Finally, we ask the Court to consider ***State v. Walter Spear, CR-88-08980***, where the State extended Mr. Spear a plea. He was convicted of three counts of First Degree Murder of his wife and two children.

In conducting the Proportionality Review, we suggest the Court review the decision in ***Adamson v. Ricketts***, 865 F.2d 1011 (1988), where the Court discusses the inconsistent application – 865 F.2d at 1037.

CONCLUSION

In conclusion, counsel for Jeffrey Landrigan, asks the Court to consider several passages from Clarence Darrow's Sentencing Speech in 1924 in the Leopold and Loeb murder trial from the book, *Attorney for the Damned*, Simon and Schuster, N.Y. 1957. In discussing justice, Darrow stated:

> "Can you administer law without consideration? Can you administer what approaches justice without it? Can this Court or any court administer justice by consciously turning his heart to stone and being deaf to all the finer instinct which move men? Without those instincts I wonder what would happen to the human race?
>
> If a man could judge a fellow in coldness without taking account of his own life, without taking account of what he knows of human life, without some understanding – how long would we be a race of real human beings? It has taken the world a long time for man to get to even where he is today. If the law was administered without any feeling of sympathy or humanity or kindliness, we would begin our long, slow journey back to the jungle that was formerly our home." p.48.
>
> He goes on to say:
>
> "Do I need to argue to your Honor that cruelty only breed cruelty? – that hatred only causes hatred? – that if there is any way to soften this

> human heart, which is hard enough at its best, if there is any way to kill evil and hatred and all that goes with it, it is not through evil and hatred and cruelty; it is through charity, and love and understanding?
>
> How often do people need to be told this? Look back at the world. There is not a man who is pointed to as an example to the world who has not taught it. There is no a philosopher, there is not a religious leader, there is not a creed that has not taught it. This is a Christian community, so-called, at least it boasts of it, and yet they would hang these boys in a Christian community. Let me ask the court, is there any doubt about whether these boys would be safe in the hand of the founder of the Christian religion? It would be blasphemy to say they would not. Nobody could imagine, nobody could even think of it. And yet there are men who want to hang them for a childish purposeless act, conceived without the slightest malice in the world." *Id.*, at 52.

The defense asserts that mere revenge is not recognized as adequate basis for sentencing. The objective of sentencing is, and should always be, to avoid offenses in the future, not generally, but in this individual case.

We, again, ask the Court to refer to the *Barker* case where the court stated:

> "Central to our system of values and implicit in the requirement of individualized sentencing is the categorical imperative that no person may be used merely as an instrument of social policy, that human beings are to be treated not simply as a means to a social end like deterrence, but also – and always – as ends in themselves. See,

e.g., I. Kant, *Groundwork of the Metaphysics of Morals*, 66-67 (H. J. Paton trans.2d ed 1964).

> **(Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end);**

see also, I. Kant, *Philosophy of Law*, 196 (W. Hastie trans. 1887)

> **(One man ought never to be dealt with merely as a means subservient to the purpose of another):**

accord *United States v. Barker*, 514 F.2d 208, 231 (D.C. cir. 1975) (en banc) (Baselon, J., concurring); L. Tribe, *American Constitutional Law*, 463 (1978); R. Dworking, *Taking Rights Seriously*, 198 (1977). 771 F.2d 1368-1369."

Again, quoting Clarence Darrow:

> What is my friend's idea of justice? He says to this court, whom he says he respects – and I believe he does – Your Honor, who sits here patiently, holding the lives of these two boys in your hands:
>
> 'Give them the same mercy that they gave to Bobbie Franks.'
>
> Is that the law? Is that justice? is this what [illegible]unt should do? Is this what a state's at[illegible]ey should do? If the state in which I live is not any kinder, more humane, more considerate, more intelligent than the mad act of these two boys, I am sorry that I have lived so long. p.38.

What we are asking this Court to do is keep in mind that this is an individual, Jeffrey Landrigan, who is being sentenced; Jeffrey Landrigan, an individual who has an individual background, Jeffrey Landrigan, an individual convicted of individual offenses. The Court must stay away from generalizations which may have some validity in some cases. The key is the defendant is capable of responding to rehabilitation. Justice requires that the sentence imposed must also be capable of achieving his personal rehabilitation.

The defendant concludes with, again, these thoughts from Darrow:

> "We are satisfied with justice, if the court knows what justice is, or if any human being can tell what justice is. If anybody can lock into the minds and hearts and the lives and the origin of these two youths and tell what justice is, we would be content. But nobody can do it without imagination, without sympathy, without kindliness, without understanding, and I have faith that this Court will take this case, with his conscious, and his judgment and his courage and save these boys' lives." p.49.
>
> * * *
>
> " . . . And just I ask these boys get mercy by spending the rest of their lives in prison, year following year, month following month, and day following day, with nothing to look forward to but hostile guards and stone walls? It ought not to be hard to get that much mercy in any court in the year 1924." p.44.
>
> * * *

> "I am pleading for the future; I am pleading for a time when hatred and cruelty will not control the hearts of men, when we can learn by reason and judgment and understanding and faith that all life is worth saving, and that mercy is the highest attribute of man." pp. 86-87.

RESPECTFULLY SUBMITTED this 19 day of October, 1990.

DEAN W. TREBESCH
MARICOPA COUNTY
PUBLIC DEFENDER

By: /s/ Dennis Farrell
Dennis M. Farrell
Deputy Public Defender

Copy of the foregoing
mailed/delivered this
19 day of October, 1990, to:

The Hon. CHERYL K. HENDRIX
Judge of the Superior Court
Central Court Building
201 West Jefferson Street
Phoenix, AZ 85003

JEFF SANDLER
Deputy County Attorney
111 West Monroe, 15th Floor
Phoenix, AZ 85003

By: /s/ Dennis M. Farrell
Dennis M. Farrell
Deputy Public Defender

EXHIBIT B
B-1

[LOGO]

ST. JOHN MEDICAL CENTER
[ILLEGIBLE] SOUTH UTICA AVE. • TULSA, OKLAHOMA 74104

AN EQUAL OPPORTUNITY
EMPLOYER M/F, HANDICAPPED

ADMISSION FORM		STRICTLY NO REPORT		[ILLEGIBLE]
9 0260723	ADMIT DATE 7-19-79	[ILLEGIBLE]	[ILLEGIBLE]	[ILLEGIBLE] 8/17/79
			[ILLEGIBLE]	[ILLEGIBLE] ACCOUNT NO.
COST CENTER 933	[ILLEGIBLE] 0265	[ILLEGIBLE] 1	[ILLEGIBLE] S	[ILLEGIBLE] $107.00
		[ILLEGIBLE] YES	REASON FOR PRIVATE ROOM	COST ACCOUNT NO.
[ILLEGIBLE] 755	ATTENDING PHYSICIAN W R REID			
ADMITTING DIAGNOSIS ALCOHOLISM				
LAST NAME LANDRIGAN	FIRST NAME JEFFREY	MIDDLE INITIAL T	MAIDEN NAME	[ILLEGIBLE] NO

[ILLEGIBLE] 1630 SMYSOR, BARTLESVILLE	CITY	STATE OK	ZIP 74003	HOME PHONE 333-3984

AGE	BIRTH DATE	SEX	RACE	MARITAL STATUS
17	03 17 62	M	C	S

		SOCIAL SECURITY NO.	RELIGION	CHURCH
			P	BAPTIST NCP

EMPLOYER'S NAME	OCCUPATION	LENGTH OF EMPLOYMENT
UNEMPLOYED		

EMPLOYER'S ADDRESS	CITY	STATE	ZIP	BUSINESS PHONE

[ILLEGIBLE] LAST NAME	FIRST NAME	EMPLOYER	BUSINESS PHONE
LANDRIGAN	DOROTHY – MOTHER	PHILLIPS PETROLEUM	

LAST NAME OF OTHER RELATIVE OR FRIEND	FIRST NAME	RELATION	PHONE

ADDRESS	CITY	STATE	ZIP	PHONE

RESPONSIBLE PARTY LAST NAME	FIRST NAME	RELATIONSHIP	PHONE
LANDRIGAN	EDWARD	FATHER	SAME

RESPONSIBLE PARTY ADDRESS	CITY	STATE	ZIP	SOCIAL SECURITY NO.
SAME				

RESPONSIBLE PARTY EMPLOYER	OCCUPATION	LENGTH OF EMPLOYMENT
CITIES SERVICE	GEOLOGIST	28 YR

R P EMPLOYERS ADDRESS	CITY	STATE	ZIP	BUSINESS PHONE
BOX 300	TULSA	OK	74102	

[ILLEGIBLE]	[ILLEGIBLE]	POLICY NO.	[ILLEGIBLE]
998 EQUITABLE	G		EDWARD LANDRIGAN

[ILLEGIBLE]
CITIES SERVICE CO. PO BX 300 TULSA OK 74102

[ILLEGIBLE]	[ILLEGIBLE]	POLICY NO.	[ILLEGIBLE]
998 TRAVELERS	G		DOROTHY LANDRIGAN

SECONDARY INSURANCE ADDRESS MR. PAUL BRIGGS, C/O PHILLIPS PETROLEUM CO 125 FRANK PHILLIPS BLDG, BARTLESVILLE OK 74003

BLUE CROSS NAME	GROUP NO.	SUBSCRIBER'S NO.	EFFECTIVE DATE	TYPE CONTRACT

	[ILLEGIBLE]

MEDICARE NAME	MEDICARE NO.	HOSPITAL LAST [ILLEGIBLE] WHERE?	FROM	TO
		NO		

WELFARE [ILLEGIBLE] APPLIED	WILL APPLY	LAST ADMISSION HERE	LAST NAME AT THAT TIME
		NO	

ACCIDENTAL INJURY	WORK RELATED?	TYPE OF ACCIDENT	DATE OF ACC.	TIME OF ACC.
NO				

	PLACE OF ACCIDENT

[ILLEGIBLE] 02	DISCHARGE TYPE XXXXXXX COURTESY	ADM BY JG	PRE-ADM BY	INFO TAKEN [ILLEGIBLE] ATC VERIFICATION BY VIVIAN
PRIMARY DIAGNOSIS Alcoholism				CODE NO. 373.90
SECONDARY DIAGNOSIS				
COMPLICATIONS				
OPERATIONS				

M.E.D. [ILLEGIBLE] _____
[ILLEGIBLE] ___ [ILLEGIBLE] ___ [ILLEGIBLE] ___
F.D. ✓ D.S. [ILLEGIBLE] H.V. H.P.
Other: _____
[ILLEGIBLE] CLEARANCE 2

FOR MEDICAL RECORD USE ONLY
ABSTRACT B-1

CONDITION ON DISCHARGE
☒ ALIVE
☐ EXPIRED
☐ EXTENDED CARE

/s/ _____ [ILLEGIBLE] _____
ATTENDING PHYSICIAN
CHART COPY

B-2

[LOGO]

ST. JOHN MEDICAL CENTER
[ILLEGIBLE] SOUTH UTICA AVE. • TULSA, OKLAHOMA 74104

AN EQUAL OPPORTUNITY
EMPLOYER M/F, HANDICAPPED

DISCHARGE SUMMARY

PATIENT:	LANDRIGAN, JEFFREY	WILLIAM F. REID, M.D.
HOSPITAL NO:	9025072-3	
DATE OF ADMISSION:	7/19/79	
DATE OF DISCHARGE:	8/17/79	

SUMMARY: This 17 year old high school senior to be was admitted to St. John's Hospital, specifically to the Alcohol Treatment program on 7/19/79. He has had a history of very severe alcoholism dating back at least six months. He has also been rather heavy on the drug scene earlier with may uppers and downers. Recently, however, he had concentrated entirely on alcohol. The patient contributed and participated actively in the alcohol treatment program consisting of individual counseling, AA meetings, educational seminars, some biofeedback conditioning and detoxification. His family also became involved in the treatment process to a certain extent. There are still some lingering family problems, however that will need to be resolved.

The patient was discharged in a much improved state on 8/17/79.

FINAL DIAGNOSIS:

1. Alcoholism, severe, currently in a much improved state.

This young man will need continued follow-up in the form of counseling and participation in Alcoholic Anonymous, and perhaps family therapy. He states he has a counselor in Bartlesville that he has seen before and that he will see on a regular basis.

PROGNOSIS: Guarded.

/s/ [ILLEGIBLE]
WILLIAM R. REID, M.D. sac Ch 9
Dictated 8/18/79 Transcribed 8/26/79

DISCHARGE SUMMARY

B-3

[LOGO]

ST. JOHN MEDICAL CENTER
[ILLEGIBLE] SOUTH UTICA AVE. • TULSA, OKLAHOMA 74104

AN EQUAL OPPORTUNITY
EMPLOYER M/F, HANDICAPPED

HISTORY

PATIENT: JEFFREY LANDRIGAN, W. R. REID, M.D.
#90260723

ADMITTED: 7-19-79

CHIEF COMPLAINT: "I am drinking way too much".

PRESENT ILLNESS: This 17 year old high school senior to be, was admitted to St. Johns Hospital specifically to the Alcohol Treatment Program with a history of severe

alcoholism, dating back to 6 months ago. The patient states that he has been on the drug scene earlier, with some uppers and downers but recently has concentrated on alcohol. He has been drinking far too much and stated that he simply can not function effectively now at home or in school. He realizes that he needs some help and seems well motovated for treatment at this time.

PAST HISTORY: He is an adopted child, having been adopted at very few weeks after birth. He has no knowledge of his biological parents. He states that he gets along fairly well with his adopted parents. He has done fair in school although his concentration has not been good and he feels that he is not at all living up to his potentials. The patient denies any serious family problems and states that most of the difficulties are of "my own doing".

PAST MEDICAL HISTORY: There is no history of serious operations and no illnesses.

REVIEW OF SYSTEMS: Is essentially non-contributory.

FAMILY HISTORY: The patient has no knowledge of his biologic parents. Adopted father works for Phillips in Bartlesville.

HISTORY

B-4

[LOGO]

ST. JOHN MEDICAL CENTER
[ILLEGIBLE] SOUTH UTICA AVE. • TULSA, OKLAHOMA 74104

AN EQUAL OPPORTUNITY
EMPLOYER M/F, HANDICAPPED

PHYSICAL EXAMINATION

PATIENT: JEFFREY LANDRIGAN

PULSE: 90
RESP: 20
BP: 115/75

HEAD: NECK:	Are negative.
EENT:	The pupils are equal and react to L & A. There is no retinopathy.
EARS: THROAT:	Appear normal. There is no adenopathy.
LUNGS:	Are clear to P & A.
HEART:	Is normal sinus rhythm without murmurs.
ABDOMEN:	Is soft without masses or tenderness noted. LK&S are not palpable.
PELVIC: RECTAL:	Are not indicated at this time.
EXTREMITIES;	Are negative.
GENITALIA:	Is normal male.
NEUROLOGICAL:	DTR's are active and equal bilaterally. There is no impairment of sensory modalities. Muscle strength is adequate.
MENTAL STATUS:	The patient relates in a very cooperative manner. Speech is somewhat

hesitant, although cooherent and relevant. He is moderately depressed and tense. Orientation is intact in all spheres, Memory and general intelligence are satisfactory but concentration is mildly impaired.

IMPRESSION:

1. Alcoholism

This young man definitely needs in-patient treatment consisting of individual and group therapy, AA meetings, educational program and perhaps some detoxification, although he is not experiencing any withdrawal symptoms at this time.

/s/ [ILLEGIBLE]
W. R. REID, M.D./sd D & T 7-22-79
Ch 3

PHYSICAL EXAMINATION

B-5

[LOGO] ST. JOHNS MEDICAL CENTER
[ILLEGIBLE] SOUTH UTICA AVE • TULSA, OKLAHOMA [STAMP]

An equal opportunity employer M/F handicapped

ALCOHOL TREATMENT PROGRAM

INITIAL INTERVIEW INFORMATION

INTERVIEWER Gil Baker DATE 7/23/79

PATIENT NAME Jeff Landrigan DATE OF BIRTH 3/17/62 AGE 17

REFERRAL SOURSE Phillips Oil Co.

HOW DID PATIENT ARRIVE: Car AMB ✓ NON AMB __

WHAT CONDITION: Sober

FAMILY HISTORY

PARENT LIVING FATHER Living AGE 55

MARITAL HISTORY OF FATHER 1 time

FATHER'S OCCUPATION Chief Geologist for Cities Service

PATIENT'S OPINION OF FATHER: (STRICT, PHYSICAL LOVE, EXPECTATIONS, ETC.)

Not too strict. Lots of love. Pretty lenient. Too easy to manipulate.

ADDICTIONS – FATHER'S SIDE: None

ATTITUDE OF FATHER IN TERMS OF DRINKING, ETC. Father doesn't drink

---

B-6

FAMILY HISTORY CONT.

MOTHER LIVING: Living AGE 53

MARITAL HISTORY OF MOTHER: 1 Time

MOTHER'S OCCUPATION Works for Phillips Oil Co.

PATIENT'S OPINION OF MOTHER:

Resents mother. Mother tries to dominate but with not much success.

ADDICTIONS – MOTHER'S SIDE Mother probably has a drinking problem.

WHO WAS THE DOMINANT PARENT? Father

WHICH PARENT CLOSEST TO EMOTIONALLY? Father

SIBLINGS – BROTHERS 0 SISTERS 1

WHERE IS PATIENT IN RELATIONSHIP TO AGE? Youngest by 9 yrs.
(YOUNGEST, OLDEST, MIDDLE, ETC.)

FAMILY IS OR IS NOT AN EMOTIONALLY CLOSE ONE? Not. Jeff can be more honest with older sister.

SOCIAL ECONOMIC CONDITION WAS: Middle class

HOW WAS SEX RELATED TO CHILDREN BY PARENTS? Wasn't mentioned until girlfriend got pregnant.

B-7

ETHNIC GROUP INFORMATION CULTURAL White cauc

PROBLEM IN READING, WRITING, SPEAKING? No

PREJUDICES: None

RELIGIOUS INFORMATION

CHURCH AFFILIATION No ATTENDANCE No

DO YOU PRAY? No BELIEVE IN GOD? Yes

CONFLICTS WITH RELIGION: He hasn't paid much attention

EDUCATION HISTORY

YEARS COMPLETED Has one more year of high school

DEGREES OR CERTIFICATES? No

GRADES Poor grades and skipped alot

FAVORITE SUBJECT D.E.C.A.

WORST SUBJECT English

EXTRA CURRICULAR ACTIVITIES D.E.C.A.

POPULAR Yes

DATING 13 yrs.

PEER GROUP Fast crowd – no squares

PROBLEMS IN SCHOOL Many

EMOTIONAL Doesn't like pressure or [illegible] limits. Rebelling against authority.

DISCIPLING Has been kicked out of school about 5 times. Has skipped school alot.

DRINKING ATTITUDE Started drinking at age of 13. Got drunk when he was 14. Was a weekend drunk and then began drinking during the week.

B-8

ALCOHOL AND DRUG HISTORY

BEHAVIOR Blackouts. Always gets drunk when he drinks. Wants to get high on whatever mood altering chemical available.

PERSONALITY CHANGE: Definitely.

PRIOR TREATMENT? Yes

WHERE? Methodist Boys Ranch – Gore Okla.

WHEN? March 1975

LONGEST DRY PERIOD 2 1/2 mos. at above ranch

AA INFORMATION: Been to 3 meetings

AL-ANON None

OPINION OF AA: Good

LEGAL PROBLEMS: Pending Public Drunk Charge.

OBSERVATIONS:

B-9

[LOGO] ST. JOHNS MEDICAL CENTER
[ILLEGIBLE] SOUTH UTICA AVE • TULSA, OKLAHOMA [STAMP]

An equal opportunity employer M/F handicapped

ALCOHOL TREATMENT PROGRAM

COUNSELOR'S DISCHARGE SUMMARY

PATIENT NAME Jeff Landrigan ~~Gil Ba~~ DATE 8/16/79
CASE NO. ___

COUNSELOR Gil Baker ADM. DATE 7/19/79 DISCH. DATE 8/17/79

Jeff basically came into program to get the Courts off his back however he has participated well in the activities in the program and has interacted well with the other patients.

He sees the possibility of alternate life styles and at this time seems to prefer sobriety.

The problem of living at home with an alcoholic mother bothers him but he does not have a better alternative until he is 18 yrs. old.

EXHIBIT A
A-1

JANE PHILLIPS EPISCOPAL –
MEMORIAL MEDICAL CENTER
HISTORY AND PHYSICAL EXAMINATION REPORT

Patient: Landrigan, Jeffrey

Hosp. No.:

Adm. Date: 2/6/77

Physician: Wayne J. Boyd, M.D.

CHIEF COMPLAINT: "I keep getting into trouble".

HPI: This 14 year old white male states that his problems started during the past summer. He began running around with one of his peers who talked him into breaking into a house. They were caught and the patient was placed on 9 months probation. He states that in December 1976 another friend asked him to run away with him which he did. He was gone for 23 hours and went to Arkansas with his friend where he was picked up by the police. and returned to his parents home in Bartlesville. He was seen by a juvenile officer with the District Court but nothing was done. Recently, at school, claims that one of the classmates gave him a tablet of Quaalude. He took it and states that it didn't agree well with him. He felt numb and had an undesirable reaction. He states that his father was extremely angry with him and tried to "beat me up". He states further that "I went nuts, threw things, broke windows and my father told me where the front door was if I wanted to leave and so I did". He left home and three days later his mother called the friend's home where he was staying. The friend's father talked to the patient,

encouraging him to talk with the parents who insisted that the patient come to the hospital.

The patient states that he has had difficulties in staying in school, that he doesn'tlike to sit through a class. He has been smoking pot excessively since the 9th grade, however he claims that his grades are satisfactory.

PAST HISTORY: The patient was born in Tulsa, Oklahoma, lived there 9 months and has lived in Bartlesville since that time. He denies any problems while in grade school and feels that his problems only started a few months ago. He enjoys bowling and to ride a motorcycle.

Past Illnesses: Tonsillectomy at age 5. No other history of major medical or surgical problems.

FAMILY HISTORY: The patient's mother is 52 years old. She works at Phillips Petroleum Company and the patient states she drinks excessively. The patient's father is 54 yeas old, in good health and works for Cities Service Oil Company in Tulsa. He commutes daily. Both parents have been married only one time and the patient states that the parents get along well. The patient has one sibling, a 24 year old sister with whom he feels he has a good relationship. Her profession is nursing.

PHYSICAL EXAMINATION: The patient is a well developed, well nourished 14 year old male. Body proportions are symmetrical.

EENT: Essentially negative.
NECK: Supple. Thyroid not palpable.
CHEST: Lung fields are clear.
HEART: Rhythm is regular. No murmurs.
ABDOMEN: Soft and flat.

A-2

JANE PHILLIPS EPISCOPAL –
MEMORIAL MEDICAL CENTER
PROGRESS NOTES AND DISCHARGE SUMMARY

NEURO: Tendon and superficial reflexes equal and active.

MENTAL STATUS: The patient is slightly disheveled in appearance. Is rather quiet. Somewhat withdrawn but is responsive to questions appropriately. He talks rather freely without excessive probing. He admits that he has been getting into trouble in school and with the police and with his family. He is oriented in all spheres. Shows impulsive behavior and intelligence is felt to be within average range.

IMPRESSION: Adjustment reaction of adolescence.

WJB/hgk

/s/ Wayne J. Boyd
Wayne J. Boyd, M.D.

D: 4/4/77
T: 4/5/77

A-3

JANE PHILLIPS EPISCOPAL –
MEMORIAL MEDICAL CENTER
PROGRESS NOTES AND DISCHARGE SUMMARY

Patient: Landrigan, Jeffrey

Hosp. No.:

Adm. Date: 2/6/77

Disc. Date: 2/10/77

Physician: Wayne J. Boyd, M.D.

The patient is a 14 year old white male admitted to thehospital on 2/6/77 after having conflicts on two or three occasions and having run away from home for a period of three days. The patient, on admission, was started on low doses of Mellaril. He was generally cooperative and seemed to accept being in the hospital. His custody was questionable as it was not sure whether he was in the custody of his parents or under the supervision of the court. The juvenile officer visited the patient while he was in the hospital and told him that it was probably going to be necessary that he be placed in an institution of some type. The patient seemed to be able to accept this, however later when the juvenile officer talked with the patient's mother she became somewhat hysterical and was rather angry and hostile toward the juvenile officer and tended to blame him for much of the child's difficulty. She insisted on taking the patient home from the hospital since she felt that he could obtain no help from the hospital and since he was going to be placed outside of the home, she wanted to have him home with her as much as possible. The patient was discharged rather prematurely at the insistence of the

mother on 2/10/77 to the custody of the mother and follow up through the courts.

Final Dx: Adjustment reaction of adolescence.

WJB/hgk

/s/ Wayne J. Boyd
Wayne J. Boyd, M.D.

D: 4/4/77
T: 4/5/77

SUPREME COURT OF ARIZONA

STATE OF ARIZONA, Appellee, -vs- JEFFREY TIMOTHY LANDRIGAN aka JEFFREY DALE PAGE, Appellant	Supreme Court No. CR-90-0323-AP Maricopa County No. CR-90-00066 OPINION

Appeal from the Superior Court of Maricopa County

The Honorable Cheryl K. Hendrix, Judge

AFFIRMED

Filed Feb. 25, 1993

Grant Woods, Attorney General — Phoenix

By Paul J. McMurdie, Chief Counsel, Criminal Appeals Section
Joseph T. Maziarz, Assistant Attorney General
Crane McClennen, Assistant Attorney General

Attorneys for Appellee

Dean W. Trebesch, Maricopa County Public Defender — Phoenix

By Carol A. Carrigan, Deputy Public Defender
James L. Edgar, Deputy Public Defender

John W. Rood, III — Phoenix

Attorneys for Appellant

ZLAKET, J.

This is an automatic appeal from a death sentence following defendant's conviction of first degree murder. We have jurisdiction pursuant to Ariz. Const. art. 6, § 5(3) and A.R.S. §§ 13-4033 and -4035.

FACTUAL AND PROCEDURAL BACKGROUND

Evidence at trial established that the victim's body was found in his residence on December 15, 1989. According to the testimony of a friend ("Michael"), the victim had been a promiscuous homosexual who frequently tried to "pick up" men by flashing a wad of money. This would invariably occur after he got paid. The victim told Michael that he had recently met a person named "Jeff," with whom he wanted to have sex. The victim's physical description of Jeff was later found to closely approximate defendant.

Michael received three phone calls from the victim on Wednesday, December 13, 1989. During the first, the victim said he had picked up Jeff, that they were at the apartment drinking beer, and he wanted to know whether Michael was coming over to "party." Approximately 15 minutes later, the victim called a second time and said that he was in the middle of sexual intercourse with Jeff. Shortly thereafter, the victim called to ask whether Michael could get Jeff a job. Jeff spoke with Michael about employment, and asked if he was going to come over. Michael said no. During one of these conversations, the victim indicated that he had picked up his paycheck that day.

The victim failed to show up for work the following day, and calls to him went unanswered. On Friday, a co-worker and two others went to the victim's apartment and found him dead. He was fully clothed, face down on his bed, with a pool of blood at his head. An electrical cord hung around his neck. There were facial lacerations and puncture wounds on the body. A half-eaten sandwich and a small screwdriver lay beside it. Blood smears were found in the kitchen and bathroom. Partial bloody shoeprints were on the tile floor.

Cause of death was ligature strangulation. Medical testimony at the presentence hearing indicated that the victim probably was strangled after being rendered unconscious from blows to the head with a blunt instrument.

Acquaintances testified that the apartment usually was neat. When the body was found, however, the apartment was in disarray. Drawers and closets were open; clothes and newspapers were strewn on the floor. The remnants of a Christmas present lay open and empty at the foot of the bed. In the kitchen area were two plates, two forks, a bread wrapper, luncheon meat, cheese wrappers, and an open jar of spoiled mayonnaise. A five-pound bag of sugar was spilled on the floor. A clear impression of the sole of a sneaker appeared in the sugar. Neither the paycheck nor its proceeds were located. Although the apartment had been ransacked, nothing else seemed to be missing.

When defendant first was questioned, he denied knowing the victim or ever having been to his apartment. When arrested, however, he was wearing a shirt that belonged to the victim. Seven fingerprints taken from the scene matched defendant's. The impression in the sugar

matched his sneaker, down to a small cut on the sole. Tests also revealed that a small amount of blood had seeped into the sneaker. The blood matched that found on the shirt worn by the victim.

Defendant's ex-girlfriend testified that she had three telephone conversations with him in December of 1989. During one of those, defendant told her that he was "getting along" in Phoenix by "robbing." Defendant placed the last call to her from jail sometime around Christmas. He said that he had "killed a guy . . . with his hands" about a week before.

The jury found defendant guilty of theft, second degree burglary, and felony murder for having caused the victim's death "in the course of and in furtherance of" the burglary. The jury also determined that defendant previously had been convicted in Oklahoma of assault and battery with a deadly weapon, second degree murder, and possession of marijuana. At the time of the Arizona incident, defendant was an escapee from an Oklahoma prison.

At the sentencing hearing, the trial judge found two statutory aggravating circumstances under A.R.S. § 13-703(F): that defendant was previously convicted of a felony involving the use or threat of violence on another person; and, that defendant committed the offense in expectation of the receipt of anything of pecuniary value. In making the latter finding, the trial judge noted that the victim's apartment had been ransacked, and it appeared the culprit was looking for something.

The trial judge found no statutory mitigating circumstances sufficient to call for leniency. As for non-statutory mitigating circumstances, she identified family love and absence of premeditation. She stated, however, that the

mitigating factors did not outweigh the aggravating circumstances. Defendant was sentenced to an aggravated term of 20 years on the burglary count, to six months in the county jail for theft, and to death for murder.

MOTIONS FOR ACQUITTAL AND NEW TRIAL

Defendant argues that the trial judge erred in denying his motions for acquittal and for new trial under Rules 20 and 24, Ariz. R. Crim. P., 17 A.R.S. He claims that the evidence was insufficient to find him guilty of burglary and felony murder. We disagree.

A judgment of acquittal under Rule 20 is appropriate only where there is "no substantial evidence to warrant a conviction." *State v. Mathers,* 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *Id.* (quoting *State v. Jones,* 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980)). Evidence may be direct or circumstantial, *State v. Blevins,* 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981), but if reasonable minds can differ on inferences to be drawn therefrom, the case must be submitted to the jury. *State v. Hickle,* 129 Ariz. 330, 331, 631 P.2d 112, 113 (1981). A trial judge has no discretion to enter a judgment of acquittal in such a situation.

Under Rule 24, a new trial is required only if the evidence was insufficient to support a finding beyond a reasonable doubt that the defendant committed the crime. *State v. Neal,* 143 Ariz. 93, 97, 692 P.2d 272, 276 (1984). Whether to grant or deny a new trial is, however, within the sound discretion of the trial court and will not be

disturbed on appeal absent an abuse of that discretion. *State v. Hickle,* 133 Ariz. 234, 238, 650 P.2d 1216, 1220 (1982).

A. Burglary

The evidence here, although circumstantial, is sufficient to uphold the burglary conviction. It supports the conclusion that defendant entered or remained in the apartment with the intent to commit a theft. A.R.S. § 13-1507(A). The fact that the victim was found on his bed fully clothed, next to a half-eaten sandwich, suggests he was killed before the apartment was ransacked. Any other conclusion would require an inference that the victim entered his apartment, found it trashed, then calmly made himself a sandwich and sat down on his bed to eat it. As the trial judge noted, the ransacked apartment indicates that the culprit was probably looking for things of value. The evidence clearly placed defendant, who admitted getting along by "robbing," and who was wearing one of the victim's shirts when arrested, in the ransacked apartment.

This case is not, as defendant argues, similar to *State v. Hill,* 12 Ariz. App. 196, 469 P.2d 88 (1970), in which the evidence showed only that the accused was present at the scene of a burglary. In *Hill,* unlike here, no evidence linked defendant to the crime itself. *Id.* at 197, 469 P.2d at 89.

Since reasonable minds could differ on the inferences to be drawn, the trial judge properly denied the Rule 20 motion. Additionally, because the verdict on the burglary count was not contrary to the weight of the evidence, the trial judge did not abuse her discretion in denying the Rule 24 motion.

B. Murder

On the charge of felony murder, it was for the jury to decide whether defendant committed or attempted to commit burglary in the second degree and, in the course of and in furtherance of that crime, caused the victim's death. A.R.S. § 13-1105(A)(2); *State v. Hallman,* 137 Ariz. 31, 38, 668 P.2d 874, 881 (1983). As noted above, the record contains substantial evidence to support the burglary conviction. Additionally, defendant admitted to his ex-girlfriend that he killed a man about a week before December 23rd, and the blood on his shoe matched that on the victim's shirt.

Defendant's reliance on *State v. Lopez,* 158 Ariz. 258, 762 P.2d 545 (1988), is misplaced. In *Lopez,* this court concluded that a felony murder conviction could not stand because the evidence did not support the elements of the underlying armed robbery (the coexistence of intent to commit robbery with the use of force). The evidence showed only that defendant and his brother took the victim's car and wallet to leave the scene and delay detection of the victim's identity. *Id.* at 264, 762 P.2d at 551.

The record here contains much more. The trial judge could not properly have granted defendant's motion for acquittal, nor did she abuse her discretion in denying the motion for new trial.

INSTRUCTION ON LESSER DEGREES OF HOMICIDE

Defendant next argues, citing *Beck v. Alabama,* 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), that the trial judge's failure to *sua sponte* instruct the jury on lesser degrees of homicide – second degree murder or

manslaughter – deprived him of a fair trial by forcing the jury to convict him of first degree murder or "set . . . him free." Defendant failed to request any lesser homicide instruction at trial, but contends that the failure to instruct was fundamental error.

We find no error here, fundamental or otherwise. In *Beck,* the United States Supreme Court invalidated an Alabama statute prohibiting the judge in a capital case from instructing the jury on lesser included offenses, even though the evidence supported such instruction. The Court reasoned:

> [W]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense – but leaves some doubt with respect to an element that would justify conviction of a capital offense – the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

447 U.S. at 637, 100 S. Ct. at 2389, 65 L. Ed. 2d at 402-03. Thus, the fundamental concern in *Beck* was that a jury – convinced that the defendant had committed some violent crime, but unsure that he was guilty of a capital crime – might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all. *Schad v. Arizona,* ___ U.S. ___, 111 S. Ct. 2491, 2504, 115 L. Ed. 2d 555, 574 (1991). In Arizona, however, there is no lesser included homicide offense to the crime of felony murder, because the necessary *mens rea* is supplied by the intent required for the underlying felony. *State v. Arias,* 131 Ariz. 441, 641 P.2d 1285 (1982); *Schad,* ___ U.S. at ___ n.5, 111 S. Ct. at 2512 n.5, 115 L. Ed. 2d at 584 n.5 (1991) (White, J., dissenting).

Defendant argues that the evidence warranted a manslaughter or second degree murder instruction. He claims to have placed a telephone call to his mother around December 12th or 13th in which he told her he was bleeding from his ears, nose, and rectum. He asserts the jury could have concluded from this evidence that he was injured during sex and killed the victim in response "upon a sudden quarrel or heat of passion."

Even if we construe his mother's highly equivocal testimony on this point in a light most favorable to defendant, the evidence is insufficient to support a finding that he killed the victim during a sudden quarrel or the heat of passion, or in response to injuries inflicted on him during sex. *Beck* does not require a trial court to instruct on a lesser offense that is unsupported by the evidence. Therefore, the failure to have done so in this case was not error. *See State v. LaGrand,* 153 Ariz. 21, 30, 734 P.2d 563, 572 (1987). *See also State v. Arias,* 131 Ariz. at 443-44, 641 P.2d at 1287-88 (1982) (*Beck* does not apply because Arizona law differs significantly from Alabama law).

EQUAL PROTECTION

Defendant's next argument, that the failure to have a jury decide the existence of aggravating circumstances violated his equal protection rights, also lacks merit. The Sixth Amendment does not require that a jury make findings of aggravating and mitigating circumstances before the death penalty is imposed. *Walton v. Arizona,* 497 U.S. 639, ___, 110 S. Ct 3047, 3054, 111 L. Ed. 2d 511, 524 (1990). Sentencing factors – as opposed to the elements of an offense – may be found by the court at the sentencing hearing. *State v. Hurley,* 154 Ariz. 124, 130,

741 P.2d 257, 263 (1987). We find no constitutional violation. *See Clark v. Ricketts,* 958 F.2d 851, 859 (9th Cir. 1992) (federal equal protection clause does not require that a jury find the aggravating circumstances supporting a death sentence).

EIGHTH AMENDMENT

Defendant argues that Arizona's death penalty scheme, taken as a whole, violates the Eighth Amendment by failing to "sufficiently channel the sentencer's discretion." We recently rejected this argument in *State v. Greenway,* 170 Ariz. 155, 164, 823 P.2d 22, 31 (1991) (Arizona's death penalty statute narrowly defines the class of death-eligible defendants). Likewise, defendant's suggestion that Arizona's aggravating circumstances are too broad to be meaningful is without substance.

AGGRAVATING AND MITIGATING CIRCUMSTANCES

We have independently reviewed the record to determine the presence or absence of aggravating and mitigating circumstances, and the propriety of the death penalty. *State v. Richmond,* 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976). Defendant claims the record does not support a finding that the murder was committed with the expectation of the receipt of anything of pecuniary value, pursuant to A.R.S. § 13-703(F)(5).

We disagree. Not only is the actual receipt of money or valuables not required to find the expectation of pecuniary gain, *State v. LaGrand,* 153 Ariz. 21, 36, 734 P.2d 563, 578 (1987), but here defendant was convicted of theft and burglary on evidence we have deemed sufficient. Defendant

admitted he was getting money by robbing. The victim, who was pursuing defendant as a sexual partner, was an obvious target. The apartment was ransacked. The killing hardly appears to have been unexpected or accidental. *See State v. Nash,* 143 Ariz. 392, 405, 694 P.2d 222, 235 (unexpected or accidental death during course of or flight from robbery will not support aggravating circumstance of pecuniary gain) (1985). Physical and testimonial evidence supports the finding that pecuniary consideration was a cause, not merely a result, of the murder. *LaGrand,* 153 Ariz. at 35, 734 P.2d at 577 ("When the defendant comes to rob, the defendant expects pecuniary gain and this desire infects all other conduct of the defendant").

The record also supports the finding of a second aggravating circumstance, that defendant previously was convicted of a felony involving the use or threat of violence on another person under A.R.S. § 13-703(F)(2). *See* Okla. Stat. tit. 21, §§ 641, 642, 645 (1971) (assault and battery with a dangerous weapon). Defendant on appeal does not contest this finding. The state produced certified public records from Oklahoma, and its expert matched defendant's fingerprints with those on the records.

We also agree that the record does not present mitigating evidence sufficiently substantial to call for leniency. The trial judge properly rejected defendant's suggestion that intoxication was a mitigating circumstance under A.R.S. § 13-703(G)(1). The only evidence on this subject was testimony from the friend who said the victim called and told him that he and Jeff were drinking beer. There was no evidence that defendant was impaired, that he did not have the capacity to appreciate the wrongfulness of his conduct, or that he could not conform his conduct to the requirements of the law.

THE DEATH SENTENCE

Defendant argues that imposing the death sentence was unwarranted because the trial judge found the crime "not out of the ordinary when considering first degree murders." The judge determined, however, that while the crime was not out of the ordinary, defendant clearly was. She said:

> . . . Mr. Landrigan appears to be somewhat of an exceptional human being. It appears that Mr. Landrigan is a person who has no scruples and no regard for human life and human beings and the right to live and enjoy life to the best of their ability, whatever their chosen lifestyle might be. Mr. Landrigan appears to be an amoral person.

Defendant's comments in the courtroom support these conclusions. At the sentencing hearing, he offered the following soliloquy:

> Yeah. I'd like to point out a few things about how I feel about the way this [expletive], this whole scenario went down. I think that it's pretty [expletive]ing ridiculous to let a fagot (sic) be the one to determine my fate, about how they come across in his defense, about I was supposedly [expletive]ing this dude. This never happened. I think the whole thing stinks. I think if you want to give me the death penalty, just bring it right on. I'm ready for it.

Defendant made additional statements during the hearing. When his counsel attempted to characterize the prior second degree murder as self-defense, defendant interjected:

> THE DEFENDANT: See, also, Your Honor, there's a few things he got wrong here again. I'd like to clear them up.
>
> THE COURT: Please do, Mr. Landrigan.
>
> THE DEFENDANT: When we left the trailer, [the victim] went out of the trailer first. My wife was between us. I pulled my knife out, then I was the one who pushed her aside and jumped him and stabbed him. He didn't grab me. I stabbed him.

In attempting to explain the aggravated assault committed by defendant while in prison on this prior murder charge, defense counsel claimed that his client had been threatened by the person he assaulted, allegedly a friend of the murder victim's father. Defendant once more took issue with his lawyer:

> THE DEFENDANT: Yeah, something else that was just said about the guy that was in prison. That wasn't [the murder victim's] dad's friend or nothing like that. It was a guy I got in an argument with. I stabbed him 14 times. It was lucky he lived. But two weeks later they found him hung in his cell. He was dead. It wasn't nothing like it was presented.

The best we can say for this defendant is that he was forthright. His comments demonstrate a lack of remorse that unfavorably distinguishes him from other defendants and supports imposition of this severe penalty. *See State v. Fierro,* 166 Ariz. 539, 548, 804 P.2d 72, 81 (1990) ("We will not uphold imposition of the death penalty unless either the murder or the defendant differs from the norm of first degree murders or defendants").

ASSISTANCE OF COUNSEL

Finally, defendant argues that his trial counsel deprived him of effective assistance by instructing the probation officer not to interview defendant in preparation for the aggravation/mitigation hearing. On direct appeal, we will not reverse a conviction on ineffective assistance grounds absent an evidentiary hearing below. *State v. Carver,* 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). Here, no hearing occurred because defendant moved to dismiss his petition for post-conviction relief. The trial judge granted that motion. We address the issue now only because "we may clearly determine from the record that the ineffective assistance claim is meritless." *Id.*

To establish ineffective assistance of counsel, defendant must prove that (1) counsel lacked minimal competence as determined by prevailing professional norms, and (2) counsel's deficient performance prejudiced the defense. *Carver,* 160 Ariz. at 174, 771 P.2d at 1389. Whether counsel's actions are reasonable may be determined or substantially influenced by the defendant's own statements or actions. *Strickland v. Washington,* 466 U.S. 668, 691, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674, 695 (1984).

At the sentencing hearing, defendant instructed his lawyer not to present any mitigating evidence. He prohibited his ex-wife and mother from testifying in his behalf, and they honored his wishes. Over defendant's objections, his attorney stated on the record what he thought those witnesses would say, specifically that defendant had a past history of substance abuse, that his mother had abused drugs when pregnant with him, that he was supporting a family, and that his prior murder conviction involved elements of self-defense. As previously indicated,

defendant interjected with a more inculpatory version of that prior killing.

Counsel's instruction to the probation officer was clearly within the wide range of professionally competent assistance, given defendant's stated desire not to have mitigating evidence presented in his behalf, and his tendency to volunteer damaging statements like those made to the trial judge at the hearing. Contrary to defendant's argument, this case is not like *State v. Smith,* 136 Ariz. 273, 665 P.2d 995 (1983). The defendant in *Smith* would have testified in mitigation that he did not intentionally shoot the victim, but for erroneous legal advice from his counsel as to the admissibility of such statements in any subsequent legal proceeding. We held that "advising a client incorrectly about the black letter Rules of Criminal Procedure, especially in a matter of life and death," was not "minimally competent representation." *Id.* at 279, 665 P.2d at 1001.

This case does not present such a situation. In his comments, defendant not only failed to show remorse or offer mitigating evidence, but he flaunted his menacing behavior. On this record it is reasonable to assume that had defendant been interviewed, it would not have been to his benefit. There is no showing of incompetence or prejudice.

In view of the majority holding in *State v. Salazar,* 128 Ariz. Adv. Rep. 10, 19-20 (1992), we have not conducted a proportionality review. We have, however, reviewed the record for fundamental error pursuant to A.R.S. § 13-4035, and found none. Defendant's convictions and sentences are affirmed.

THOMAS A. ZLAKET,
Justice

STANLEY G. FELDMAN, Chief Justice

JAMES MOELLER, Vice Chief Justice

ROBERT J. CORCORAN, Justice

FREDERICK J. MARTONE, Justice

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ATTORNEY FOR PETITIONER

IN THE SUPERIOR COURT OF MARICOPA COUNTY, ARIZONA

STATE OF ARIZONA Respondent, v. JEFFREY TIMOTHY LANDRIGAN, Petitioner.	No. CR 90-00066 **MOTION FOR APPOINTMENT OF EXPERT** Judge Cheryl K. Hendrix

(Filed May 5, 1994)

Petitioner, through counsel undersigned, requests that an order issue appointing a medical expert to assist in Petitioner's claim for relief for the reasons indicated in the following memorandum.

RESPECTFULLY SUBMITTED this 5th of May, 1994.

By /s/ Jan J. Raven
JAN J. RAVEN
Attorney

MEMORANDUM

One of the claims for Post Conviction relief rased by Petitioner is that his attorney was ineffective for failing to present expert testimony concerning the adverse effects of

maternal ingestion of drugs and alcohol during pregnancy on a developing fetus. Counsel for Petitioner avows to the Court that she will present lay witness evidence to substantiate that Petitioner's biological mother consumed such adverse chemicals during her pregnancy with him. Counsel further avows that that evidence is from sources not explored or presented by defense counsel at the presentencing hearing.

Counsel will need the assistance of an expert to establish that substantial mitigating evidence in this regard was not sufficiently presented to the trial court. This is particularly true as trial counsel did not arrange to have a medical expert present at the hearing. (See Exhibit 1, attached from sentencing transcript). Counsel undersigned is contract counsel. Accordingly, counsel was first required to present this request to the Office of Alternative Indigent Representation. This request was denied by that office. Therefore, this motion is now presented to the trial court.

RESPECTFULLY SUBMITTED this 5th of May, 1994.

By /s/ Jan J. Raven
JAN J. RAVEN
Attorney

Copy of the foregoing motion
mailed/delivered this 5th day
of May, 1994, to:

THE HONORABLE CHERYL HENDRIX
Judge of the Superior Court

GERALD GRANT
Deputy County Attorney

By /s/ Jan J. Raven
JAN J. RAVEN
Attorney

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ATTORNEYS FOR RESPONDENT

ARIZONA SUPERIOR COURT
COUNTY OF MARICOPA

STATE OF ARIZONA, RESPONDENT, -vs- JEFFREY TIMOTHY LANDRIGAN, PETITIONER.	CR-90-00066 RESPONSE TO MOTION FOR APPOINTMENT OF EXPERT (THE HON. CHERYL K. HENDRIX)

(Filed May 13, 1994)

Respondent, State of Arizona, opposes Petitioner's motion for appointment of expert and respectfully requests that the motion be denied.

DATED this 13th day of May, 1994.

Respectfully submitted,

GRANT WOODS
ATTORNEY GENERAL

/s/ Joseph T. Maziarz
JOSEPH T. MAZIARZ
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR RESPONDENT

MEMORANDUM OF POINTS AND AUTHORITIES

Petitioner asks this Court to issue an order appointing a "medical expert" (at court expense) so that current counsel can explore the alleged "adverse effects of maternal ingestion of drugs and alcohol during pregnancy on a developing fetus,"[1] and whether trial counsel was ineffective in not offering such evidence in mitigation at sentencing.

This Court should deny the motion because Petitioner *personally* waived his right to present mitigation *and* instructed his mother not to testify in mitigation. Additionally, all claims of ineffective assistance of trial counsel are precluded.

At the sentencing hearing, Petitioner's trial counsel informed the Court that Petitioner had instructed the witnesses counsel intended to call in mitigation, Sandy Landrigan (Petitioner's ex-wife) and Virginia Gipson (Petitioner's natural mother), *not* to testify at the hearing. (R.T. of Oct. 25, 1990, at 2-4.) Counsel stated that he had "strongly" advised Petitioner that it was "very much against his interests to take that particular position." *(Id.* at 4.) The Court then personally addressed Petitioner as follows:

THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish for him to bring *any mitigating circumstances* to my attention?

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[1] This is apparently a variation of the currently in vogue claim of "fetal alcohol syndrome." *See Harris v. Vasquez*, 949 F.2d 1497, 1506-07 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1275 (1992); *Francis v. Dugger*, 908 F.2d 696, 702 (11th Cir. 1990).

THE DEFENDANT: Yeah.

THE COURT: Do you know what that means?

THE DEFENDANT: Yeah.

THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?

THE DEFENDANT: Not as far as I'm concerned.

(Id. at 4, emphasis added.) The Court then addressed the witnesses Petitioner's counsel wished to call in mitigation:

THE COURT: Ms. Landrigan, will you testify today?

MS. LANDRIGAN: No, ma'am.

THE COURT: Why not?

MS. LANDRIGAN: I just wish not to.

THE COURT: Are you doing so at the instruction of Mr. Landrigan?

MS. LANDRIGAN: Yes, my ex-husband.

THE COURT: Has he asked you not to testify because you feel – or he feels that it's in his best interests?

MS. LANDRIGAN: No. I figure it's his life going on here. If he wants me not to, I don't want to.

. . . .

THE COURT: I understand, Ms. Gipson is here. Ms. Gipson, would you like to come testify?

MS. GIPSON: No.

THE COURT: Is there anything you wish to say about your son?

MS. GIPSON: No.

(Id. at 5, 13.)

Nevertheless, the Court instructed counsel to relate what he expected the witnesses would say, had Petitioner not gagged them. To his credit, Petitioner interjected on a couple occasions, pointing out that counsel was sugar-coating Petitioner's past. (R.T. of Oct. 25, 1990, at 7-8, 11-12.)

In its opinion, the Arizona Supreme Court noted that Petitioner had instructed his attorney not to present *any* mitigating evidence:

> At the sentencing hearing, defendant instructed his lawyer not to present any mitigating evidence. He prohibited his ex-wife and mother from testifying in his behalf, and they honored his wishes.

State v. Landrigan, 176 Ariz. 1, 8, 859 P.2d 111, 118 (1993).

The law is clear – a capital defendant may waive the presentation of mitigating evidence. *Blystone v. Pennsylvania,* 494 U.S. 299, 306 n.4, 110 S. Ct. 1078, 108 L. Ed. 2d 255 (1990); *Singleton v. Lockhart,* 962 F.2d 1315, 1321, (8th Cir. 1992); *State v. Tyler,* 553 N.E. 2d 576, 583-85 (Ohio 1990) (trial court is obligated to honor a defendant's choice not to have mitigation presented); *State v. Bloom,* 774 P.2d 698, 718-19 (Cal. 1989) (same). Petitioner personally and expressly waived his right to present mitigation; he is forever bound by that decision.

A second reason exists to deny Petitioner's motion for appointment of an expert. On direct appeal, Petitioner elected to raise the issue of ineffective assistance of counsel. *Landrigan,* 176 Ariz. at 8, 859 P.2d at 118. The supreme court addressed and rejected the issue on the merits. *Id.* Petitioner is now precluded from raising any additional claims of ineffective assistance of counsel because he failed to do so on appeal. *See* Rule 32.2(a)(2) and (3), Ariz. R. Crim. P.; *State v. Tison,* 142 Ariz. 454, 457, 690 P.2d 755, 758 (1984), *vacated on other grounds,* 481 U.S. 137 (1987); *State v. Scrivner,* 132 Ariz. 52, 54, 643 P.2d 1022, 1024 (Ct. App. 1982). Since all claims of ineffective assistance of counsel will be precluded, it is simply a waste of time and scarce resources to pay a medical expert to explore a claim that Petitioner has personally waived and is precluded.

Petitioner's motion for appointment of a medical expert should be denied.

RESPECTFULLY SUBMITTED this 13th day of May, 1994.

GRANT WOODS
ATTORNEY GENERAL

/s/ Joseph T. Maziarz
JOSEPH T. MAZIARZ
ASSISTANT ATTORNEY GENERAL
CRIMINAL APPEALS SECTION

ATTORNEYS FOR RESPONDENT

COPIES of the foregoing were deposited
for mailing this 13th day of May, 1994, to:

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CRM90-1536
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IN THE SUPERIOR COURT OF MARICOPA COUNTY, ARIZONA

STATE OF ARIZONA Respondent, v. JEFFREY TIMOTHY LANDRIGAN, Petitioner.	No. CR 90-00066 **PETITION FOR POST-CONVICTION RELIEF** Hon. Cheryl K. Hendrix

NOW COMES Petitioner, through counsel undersigned, and submits his Petition for Post-Conviction Relief based upon the attached Memorandum, Affidavits, and Exhibits.

RESPECTFULLY SUBMITTED this 31st day of January, 1995.

By /s/ Jan J. Raven
JAN J. RAVEN
Attorney for Petitioner

MEMORANDUM

I. Facts and Procedure:

Petitioner, Mr. Jeffrey T. Landrigan, was charged with first degree felony murder, with burglary in the second degree, and with

* * *

danger of erroneous conviction. *Grigsby v. Mabry,* 569 F.Supp. 1273, 1283 (E.D. Ark. 1983), *modified,* 758 F.2d 226 (8th Cir. 1985). *See also, Lockhart v. McCree,* 476 U.S. 162, 173, (1986). Nonetheless, in *Lockhart,* the Supreme Court accepted that death-qualification serves a legitimate state's interest where a jury decides both the guilt and penalty to be imposed. *See, also, Buchanan v. Kentucky,* 483 U.S. 402 (1987).

In Arizona, however, the jury does not determine the appropriate sentence in a capital case. A.R.S. §13-703(B). Accordingly death qualification serves no legitimate state interest in Arizona.[2] It was, therefore, an improper infringement on Mr. Landrigan's state and federal constitutional rights to be tried by a fair and impartial jury.

B. Newly Discovered Evidence.

The State charged Mr. Landrigan with felony murder based upon the predicate felony of burglary. The State's position was that Mr. Landrigan had stolen money from the victim in the form of the proceeds from a paycheck he had cashed. The State presented testimony from the victim's co-workers that the victim had a habit of using his paycheck to attract strangers for homosexual, one night

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[2] Although the Arizona Supreme Court has sustained death qualification, those cases do not squarely address this issue. *See, State v. Sparks,* 147 Ariz. 51, 708 P.2d 732 (1985); *State v. Thomas,* 133 Ariz. 533, 652 P.2d 1380 (1982). Moreover, in *State v. Martinez-Villareal,* 145 Ariz. 441, 702 P.2d 670, *cert. denied,* 474 U.S. 975 (1985), the Court found this proper to determine whether juror's views prevented the performance of their duties, yet identified no legitimate state interest for death-qualification.

stands. They explained that the victim was usually intoxicated and that he would wave his money around after cashing his paycheck in the hope of attracting a new partner for the night. His co-workers testified that he had picked up his paycheck, of approximately $250, just before he was killed. (6/19/90, 34-35, 37-38, 55-58, 64; 6/25/90, 46) Mr. Timothy Fincher, the assistant manager where the victim had worked, testified for the State that the victim had cashed his paycheck on December 13, 1989:

> "Q. Now in your capacity as an assistant manager have you had access to and looked at banking records for the Flex Complex?
>
> "A. I haven't looked at the records. I did contact Florida and found out that Mr. Dyer's check had been cashed.
>
> "Q. When was it cashed?
>
> "A. Uh, it was cashed the same day it was issued to him.
>
> "Q. So December 13th?
>
> "A. Right." (6/25/90, 46)

The State also presented testimony from Phoenix Police Detective Michael Chambers that neither the check nor any money were found in the victim's apartment. (6/21/90, 3) From these facts, the focus of the county attorney's argument became that Mr. Landrigan had committed this crime so that he could take the victim's money. The State's primary theory was that the victim had cashed the check, used it to attract Mr. Landrigan, and then that Mr. Landrigan had stolen that money from him. The State's attorney argued that again and again in its closing arguments:

". . . We have a paycheck. The day he died, Mr. Dyer was paid. Tim Fincher told us that the check was about two hundred fifty bucks, give or take a dollar or two. That wasn't at the scene. There was no money at that apartment either. Where did that money go. . .(6/27/90, 9)

* * *

". . . Now, what else did those people tell you? Mr. Dyer likes to pick up strangers off the street, a fact of life. They also told us that Mr. Dyer had picked up his paycheck on the 13th. Remember that? About two hundred and fifty dollar paycheck.

". . . The other witnesses, Michael Shaw, James Tichy, other co-workers of the victims. Michael Shaw, probably his best friend. He told us also, yes, Mr. Dyer is a homosexual. He likes to pick up men. But what's more important about their testimony is that he picked up his paycheck on December 13th. He liked to drink, flash his money around and find a stranger or a new sexual partner to go out with. (6/27/90, 13-14)

* * *

". . . Can you imagine what a fortune two hundred and fifty dollars must be to a man who is having twenty-five dollars wired to him by his girlfriend? That's a lot of money when you are in those circumstances. A man who needs temporary jobs to make ends meet, to survive? A lot of money. (6/27/90, 14-15)

* * *

". . . And what did he get? A paycheck or the remains of the paycheck and a shirt, a Harley-Davidson T-shirt." (6/27/90, 18)

The State's attorney hit that theme hard again in his rebuttal closing arguments:

> ". . . Now, I'll go back through defense counsel's arguments for you. He made reference to the fact that Jeffrey Landrigan had no cash on him at the time of the contact by Detective Chambers. That's on December 23rd, 1989. The money or the check, whichever it might have been, was stolen on December 13th, 1989. That's ten days. If you have been living as a transient without money, how fast do you think you could go through two hundred and fifty bucks? You could sure do it in ten days, easily. There is no problem[ ] with that." (6/27/90, 39)

It turns out, however, that the paycheck of Mr. Dyer was never cashed. This fact was subsequently verified through Petitioner's investigator by contacting the payroll manager of Fleck and Associates, the victim's former employer. (Exhibits 1 and 2 attached)

Rule 32.1(e), Arizona Rules of Criminal Procedure, entitles a Petitioner to relief if he establishes that there is newly discovered evidence which, if introduced, might have affected the verdict, finding, or sentence. *E.g., State v. Bilke,* 162 Ariz. 28, 51, 52, 781 P.2d 28, 29 (1989). The five requirements for a colorable claim of newly discovered evidence are discussed in turn:

i. <u>The evidence must appear on its face to have existed at the time of trial but be discovered after trial.</u>

Exhibit 2 establishes that the evidence that the victim's check had not been cashed existed at the time of trial. The arguments of the county attorney and of defense

counsel (6/27/90, 21, 30), together with the affidavit of Petitioner's investigator (Exhibit 1) shows that the evidence was not discovered until after trial.

ii. The motion must allege facts from which the court could conclude the defendant was diligent in discovering the facts and bringing them to the court's attention.

The investigator appointed to assist with Petitioner's Post Conviction Relief Petition discovered the evidence that the victim's paycheck had not been cashed. (Exhibit 1 attached) Prior to trial, defense counsel received discovery on an ongoing basis from the prosecutor. (P. I., 10, 18-18b) In addition trial counsel filed a notice of defenses which included a request to be advised of any rebuttal witnesses. (P. I., 21-21d) During the pendency of the appeal there would have been no reason to investigate this question because matters outside the record cannot be argued on appeal. Rule 31, Arizona Rules of Criminal Procedure.

iii. The evidence must not be simply cumulative or impeaching.

As previously stated, the evidence presented at trial was that the victim had picked up and cashed his paycheck. (6/25/90, 46) No evidence was presented to the contrary. The evidence, therefore, was not cumulative. It was, moreover, more than merely impeaching evidence. Mr. Landrigan was charged with felony murder based upon the underlying felony of burglary. The primary argument by the State in this regard was that Mr. Landrigan had stolen the victim's money. Had this evidence establishing that the check had not been cashed, been

available at the time of trial, that primary argument would have been completely eliminated.

iv. The evidence must be relevant to the case.

It is clearly relevant to Mr. Landrigan's case to establish that victim did not have over $250 in cash when he was killed. Eliminating that well-recognized motive for burglary (and often murder) would have left the State with a much weaker argument that there was a burglary and with a much weaker argument that the crime was committed for pecuniary gain.

v. The evidence must be such that it would likely have altered the verdict, finding, or sentence if known at the time of trial.

Petitioner contends that the fact that the victim's check was uncashed is a crucial piece of evidence for two primary reasons.

First, it would have entirely removed the argument from the State that the victim, as was his habit, had been drinking and flashing cash in an effort to lure a sexual partner for the night. The implication that Petitioner had seen that flashing of money and responded with the intent to steal the money would have been completely removed from jury consideration. That would have made it less likely that the jury would have convicted Petitioner in the first place.

Second, even assuming conviction, without this implication provided strong underpinnings for a finding of "pecuniary gain" as a motive for murder, this Honorable Court would have been less likely to find the existence of

that aggravating factor. Without that additional aggravating factor, (1/25/90, 25), and with this Honorable Court finding some mitigation evidence (1/25/90, 30-32) the sentence of death may well not have been imposed.[3]

There is a reasonable likelihood that this evidence, if presented at trial or at sentencing, could have affected the outcome of either of those proceedings. *See*, Rule 32.1(e), Arizona Rules of Criminal Procedure; *State v. Cooper,* 166 Ariz. 126, 129, 899 P.2d 992, 995 (App. 1990). Accordingly, Petitioner is entitled to a new trial or, in the alternative, to resentencing.

C. Ineffective Assistance of Counsel at Sentencing.

Petitioner contends that he was denied effective representation of counsel during the sentencing phase of the trial. Under both the United States and Arizona Constitutions, "[t]he right to effective assistance of counsel is a fundamental right." *State v. Lee,* 142 Ariz. 210, 216; 689 P.2d 153, 159 (1984). *Accord, Strickland v. Washington,* 466 U.S. 668 (1984). The standard for determining whether counsel was ineffective at sentencing is the same as the standard for determining effectiveness at any other stage of the proceedings. *E.g., Evans v. Lewis* 855 F.2d 631, 636 (9th Cir. 1988). Counsel has a duty to undertake reasonable investigations or to make a reasonable decision

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[3] Petitioner contends that the likelihood of a different result at sentencing would have been virtually certain with this evidence, had additional mitigation been argued to the court as is subsequently addressed in this Petition.

that particular investigation is unnecessary. *Strickland v. Washington,* 466 U.S. at 691.

A claim of ineffective assistance of trial counsel requires proof that counsel's performance was deficient and that the defendant was prejudiced by that deficient performance. To establish deficient performance it must be shown that counsel's performance fell below an objective standard of reasonably effective assistance under the prevailing professional norms. To demonstrate prejudice it must be shown that but for trial counsel's deficient performance there is a reasonable probability that the result would have been different. *Strickland v. Washington, supra; State v. Nash,* 143 Ariz. 392, 694 P.2d 222 (1985); *State v.* in the outcome." *Strickland v. Washington,* 466 U.S. at 693-694. Prejudice analysis does not depend on whether the outcome of the proceeding would have been different. *Lockart v. Fretwell,* 133 S.Ct. 838 (1993). Analysis of the prejudice prong is directed to determining whether the proceeding was fundamentally unfair. *Id.* at 842. *See, United States v. Cronic,* 466 U.S. 648 (1984).

The decision whether to impose a sentence of death requires that the trial court weigh aggravating and mitigating circumstances. The State is required to prove any aggravating circumstances in A.R.S. §13-703(F) beyond a reasonable doubt. A.R.S. §13-703(C). *State v. Michael Apelt,* 176 Ariz. 349, 367, 861 P.2d 634, 652 (1993), *cert. denied,* ___ U.S. ___, 115 S. Ct. 113 (1994). The defendant must prove any mitigating circumstances by a preponderance of the evidence. *Id.* at 367. If the trial court finds aggravating circumstances but no mitigating circumstances sufficient to call for leniency, the trial court must sentence the defendant to death. A.R.S. §13-703(E).

This Court found as aggravating factors that Mr. Landrigan had a prior violent felony conviction and that this murder was committed in the expectation of pecuniary gain. (10/25/90, 24-25) This Court found as non-statutory mitigating circumstances that there was evidence of familial love and concern, that Mr. Landrigan's conduct was good while in jail and while in court, and that no evidence of premeditation had been presented in this case. (10/25/90, 30-32) This Court determined that the non-statutory mitigation found was insufficient to call for leniency.

Petitioner contends that there were two ways in which trial counsel was ineffective at sentencing. First, counsel made arrangements to present mitigation evidence from Mr. Landrigan's biological mother and former wife. Mr. Landrigan's mother was to testify concerning her use of drugs and alcohol during her pregnancy with Mr. Landrigan. Ms. Landrigan was to present testimony that Petitioner's prior conviction for second degree murder, had resulted from an altercation which was more in the nature of an act of self-defense to mitigate the impact of that conviction. At Mr. Landrigan's request those witnesses did not testify. (10/25/90, 2-11)

There were, however, alternative sources of that information which were not explored by counsel. Mr. Landrigan's biological father, Mr. Darrel Hill was an available source of that information. He was not contacted by counsel. (Exhibit 3 attached) Moreover, Mr. Landrigan's adopted sister, a registered nurse, was not contacted by counsel and she has had experience with Petitioner and as a professional with fetal alcohol syndrome. She was available and willing to testify on Petitioner's behalf in that regard. (Exhibit 5 attached) As to the fact that there was evidence that Mr. Landrigan may have acted in self

defense in the earlier case, there was the reported decision of the Court reversing his earlier conviction that counsel could have presented to the court. *Landrigan v. State*, 700 P.2d 218 (Okla. 1985) (Exhibit 6 attached)

In addition to failing to investigate these alternative sources of the mitigating evidence that trial counsel was prepared to present, he also was ineffective in a second way. That is that he failed to explore additional grounds for arguing mitigation evidence.

Petitioner's sister, Shannon Sumpter, would also have verified that their mother, Mrs. Landrigan, was an alcoholic and that that disease caused significant problems within the family which impacted adversely on Petitioner as he was growing up. Ms. Sumpter would have provided that information to the Court had she been contacted by counsel. She would, moreover, have provided additional information concerning familial problems which preceded the time of sentencing and which may have offered at least a partial explanation of Petitioner's conduct at sentencing. (Exhibit 5 attached)

There was a second source of uninvestigated mitigation evidence regarding Petitioner that is most significant. Petitioner's biological family demonstrates a long history of violent behavior. That history includes Petitioner's biological father, Mr. Darrel Wayne Hill, who was, at the time of Petitioner's trial and sentencing on death row in the state of Arkansas.[4] (Exhibit 3 and 7 attached)

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[4] Mr. Hill is presently being retried for that offense after reversal of his conviction. *See, Hill v. Lockhart*, 824 F.Supp. 1327 (E.D.Ark. 1993).

Research has long been conducted which recognizes that the propensity to commit violent acts may well have a biological component. When a biological component is added to the fact that Petitioner was raised in the dysfunctional home of an alcoholic and that he was very likely damaged by the prenatal alcohol and drug use of his biological mother, the propensity for violence becomes almost a certainty. Dr. Frank A. Elliott summarized this theory:

> "Although environmental factors contribute to violence, they are seldom its sole cause because behavior is a biosocial affair, the result of interactions between the brain, environmental situations, and endogenous drives. Thus, the nature of the brain's response to a stimulus depends on the confluence of both biological and environmental variables at ta particular moment. An unfavorable environment often operates selectively to produce antisocial behavior in certain individuals who are especially vulnerable by reason of inherited or acquired neurophysiological traits. Exclusively sociological theories fail to explain why hard-core criminal violenee runs like a scarlet thread through the fabric of all societies, *in good times and in bad, and affects all classes.* Nor do they explain why even in times of anomie, when violence spreads, it still involves only a relatively small portion of the population or why it is that many individuals who are exposed to criminogenic influences in early life do not become violent as adults, or why a significant number of people who have not been exposed to such influences do become pathologically aggressive." Elliott, Frank A. (1988), Violence: A product of biosocial interactions, 16 *The Bulletin of the American Academy of Psychiatry and The Law,* 133.

While the literature is not, and cannot be conclusive, there are many reputable authorities which have recognized and studied the biological component of violent behavior. *See, e.g.,* Volavka Jan, M.D., Martell, Dan, and Convit, Antonio, M.D., (1992) Psychobiology of the Violent Offender, 37 *Journal of Forensic Sciences,* 237-251 (Exhibit 8 attached [reference pages omitted]); Mednick, Sarnoff, Kandel, Elizabeth (1988) Congenital Determinants of Violence, 16 *The Bulletin of American Academy of Psychiatry & Law,* 101-109. (Exhibit 9 attached).

Petitioner is a virtually classic example of the case studies supporting the opinion that violent behavior has a biological component. He was adopted as a baby and did not know his biological history until he himself was incarcerated following his conviction in the state of Oklahoma. (Exhibits 3 and 5 Attached) Studies on individuals like Petitioner are the backbone of research into the biology of violence. As stated by Professor Lee Ellis regarding conclusions reached through such "persuasive" adoption studies, ". . . [E]vidence of genetic involvement in criminality is now approaching the limits of certainty."[5]

A sentence of death must be tailored to personal responsibility and moral guilt. *South Carolina v. Gathers,* 490 U.S. 805 (1989); *Emmund v. Florida,* 458 U.S. 782, 801 (1982). Where a defendant's crime is attributable to a disadvantaged background or emotional or mental problems the defendant is less culpable than one without the excuse. *California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). *See, also, State v. Wallace,* 160

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[5] Marsh, Frank H. and Katz, Janet, (1985), *Biology Crime & Ethics,* Chapter 2, p. 81.

Ariz. 424, 427, 773 P.2d 983, 986 (1989), *cert. denied,* 494 U.S. 1047 (1990). Due to ineffective assistance from trial counsel at sentencing, this Honorable Court did not have a complete and accurate picture of Petitioner's background. Accordingly, his sentence was not properly tailored to his personal responsibility and moral guilt. This Honorable Court should grant an evidentiary hearing so that Petitioner may have the opportunity of establishing his entitlement to relief on this basis. *State v. Sutton* 143 Ariz. 234 (App. 1984); *State v. Suarez,* 23 Ariz.App.,530 P.2d 402 (1975).

D. Court's Consideration of Presentence Report containing Family Recommendation of Death Sentence.

At the hearing pursuant to Rule 703, Arizona Rules of criminal Procedure, a presentence report was considered by the Court over the objection of trial counsel. (P.I., 68) The presentence report prepared in this case contained a statement from the victim's brother which unequivocally stated that it was his opinion that a sentence of death was appropriate for Mr. Landrigan:

> "Mr. Charles Dyer, the victim's brother, advised this [probation] officer that he felt the defendant deserved the death penalty. He further related that the man killed someone and it does not matter whose brother was the victim. . ." (P.I., p. 75c)

Such statements are "irrelevant to a capital sentencing decision, and [their] admission creates a constitutionally unacceptable risk" of an arbitrary sentence in violation of Appellant's Eighth Amendment rights. *Booth v.*

Maryland, 482 U.S. 496, 503 (1987). *See also, Payne v. Tennessee,* ___ U.S. ___, 111 S.Ct. 2597, 2911 n.2 (1991).

The fact that a judge imposes the death sentence in Arizona does not render the rule in *Payne* and *Booth* inapplicable. The Arizona Supreme Court has held that a *Booth* violation occurs if a

* * *

III. Conclusion:

Petitioner respectfully requests that this Honorable Court set this matter for an evidentiary hearing pursuant to Rule 32.8, Arizona Rules of Criminal Procedure. Petitioner further contends that his conviction for felony murder should be reversed or, in the alternative, that Petitioner should be resentenced to life in prison for the first degree murder conviction.

RESPECTFULLY SUBMITTED this 31st day of January, 1995.

By /s/ Jan J. Raven
JAN J. RAVEN
Attorney for Petitioner

VERIFICATION

I swear or affirm that this Petition includes all the claims and grounds for post-conviction relief that are known to me, that I understand that no further petitions concerning this conviction may be filed on any ground of which I am aware but do not raise at this time, and that

the information contained in this form and in any attachments is true to the best of my knowledge or belief.

By: /s/ Jeffrey T. Landrigan
JEFFREY TIMOTHY
LANDRIGAN

Subscribed and sworn to before me on Jan. 24, 1995.
(date)

[Illegible]
Notary Public

19 June 1997
My Commission Expires

EXHIBIT 1

AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

NORA L. SHAW,. having first been duly sworn upon her oath, does hereby depose and say:

1. That my name is Nora L. Shaw. I am a licensed private investigator with the State of Arizona with license number 8804024.

2. That on February 10, 1994 I was appointed by the Alternative Indigent Representation Project to assist attorney, Jan Raven, with an appeal investigation involving Defendant Jeffrey Timothy Landrigan, CR 90-00066.

3. That as part of my investigation, I was requested to ascertain if the paycheck belonging to the victim, Mr. Dyer, was indeed cashed.

4. That I contacted State's witness, Tim Fincher, by telephone in Elgin, Oregon. Mr. Fincher stated that he had testified at the trial of Mr. Landrigan, and that he knew that the paycheck belonging to Mr. Dyer had not been cashed by Mr. Dyer.

5. That I contacted Charlie Hitchings, manager of Fleck & Associates, the former employer of Mr. Dyer. Mr. Hitchings indicated that he had testified at Mr. Landrigan's trial and knew that Mr. Dyer had been paid on a Wednesday in the amount of approximately $300, and that Mr. Dyer had picked up his check that same afternoon.

6. That I contacted Barbara Stewart, Payroll Manager of Fleck & Associates, regarding the paycheck of Mr. Dyer. Ms. Stewart researched her records that showed that Chester Dyer's paycheck dated December 14, 1989, was never cashed. She waited until December 30, 1990 to void the check "due to the unusual circumstances."

7. That I spoke to Public Defender Investigator, George Labash, regarding his investigation on this matter. Mr. Labash had no independent recollection about the circumstances of the paycheck, or any evidence that there was knowledge prior to trial that the check was never cashed.

8. That I spoke to Mr. Labash and also, his supervisor, William Woodriffe, about locating Mr. Labash's file to refresh his memory. Neither of them, nor Donald Vert in Records, could locate the file.

9. That I spoke with Mr. Landrigan's former defense counsel, Dennis Farrell, who indicated that he never had any information that the paycheck of Mr. Dyer was not cashed, in fact, his recollection was that the check was cashed by Mr. Dyer as he was seen prior to his death with a large amount of money.

/s/ Nora L. Shaw
NORA L. SHAW

SUBSCRIBED AND SWORN to before me this 9th day of January 1995.

/s/ [Illegible]
NOTARY PUBLIC

My Commission Expires:
My Commission Expires Dec. 7, 1996

EXHIBIT 5

JAN J. RAVEN
P. O. Box 710
Phoenix, Arizona 85001
(602) 840-9118
State Bar Attorney No. 011676
ATTORNEY FOR PETITIONER

IN THE SUPERIOR COURT OF MARICOPA COUNTY, ARIZONA

STATE OF ARIZONA,	No. CR 90-00066
Respondent,	**AFFIDAVIT**
v.	Hon. Cheryl K. Hendrix
JEFFREY T. LANDRIGAN,	
Petitioner.	

STATE OF OKLAHOMA)
) **ss.**
COUNTY OF TULSA)

SHANNON SUMTER, being first duly sworn, upon her oath, deposes and says:

1. That she is the older sister of Petitioner, Jeffrey T. Landrigan.

2. That she grew up with Petitioner in the home of her biological parents, Edward and Dorothy Landrigan, who adopted Petitioner in 1962, and further that she remained in contact with her brother after he left his parents home as a young adult.

3. That Affiant is a practicing registered nurse.

4. That Affiant was aware of Petitioner's arrest and trial in this case and his subsequent sentencing and at no time was she contacted by Petitioner's trial attorney despite the fact that she was at all times ready and willing to offer whatever information and testimony necessary to assist Petitioner, particularly at sentencing.

5. That Affiant confirms that their mother, Mrs. Dorothy Landrigan suffered from alcoholism during the years when she was raising Jeffrey Landrigan and that illness caused problems and difficulties in the family during Petitioner's formative years, including arguments between Mrs. Landrigan and Petitioner over his schooling which became so significant that Mr. Landrigan was forced to stop traveling for his job to stay home.

6. That Affiant's earliest memory of Petitioner was that he had uncontrollable, outbursts of temper, occasionally violent, even as a young child which continued throughout his childhood and became more frequent as he grew older.

7. That as a registered nurse Affiant has training and experience with fetal alcohol syndrome and that, in her opinion, Petitioner exhibits signs and symptoms of suffering the ill effects of that syndrome including increased behavioral problems when he reached adolescence and an inability to realize, understand and appreciate the consequences of his actions.

8. That during 1989, the year before Petitioner was tried and sentenced in this case, [the sentencing occurred October 25, 1990] there were significant family crises of which Petitioner was aware that in Affiant's opinion had an adverse impact upon his mental state during the trial and sentencing. Those crises included finding that Edward

Landrigan had a life-threatening cardiac aneurysm which was inoperable and that, as a result he was unable to undergo hip replacement surgery so that he became an invalid confined to a wheelchair. Earlier that year Dorothy Landrigan suffered a stoke and was confined to a nursing home in which she remains. Finally, at that same time, Petitioner's maternal grandmother, was diagnosed with leukemia from which she ultimately died.

9. That Affiant has first hand knowledge that Petitioner was extremely close to his father, Edward Landrigan, and that he was also close to his maternal grandmother and mother.

Further, affiant saith not.

/s/ Shannon Sumter
SHANNON SUMTER
Affiant

SUBSCRIBED AND SWORN TO before me this 21 day of November, 1994.

3-20-96
My Commission Expires

/s/ [Illegible]
Notary Public

JAN J. RAVEN
P.O. Box 710
Phoenix, Arizona 85001
(602) 840-9118
State Bar Attorney No. 011676
ATTORNEY FOR PETITIONER

IN THE SUPERIOR COURT OF MARICOPA COUNTY, ARIZONA

STATE OF ARIZONA, Respondent, v. JEFFREY TIMOTHY LANDRIGAN Petitioner.	No. CR 90-00066 **Motion for Rehearing of Dismissal of Post-Conviction Relief Petition** Hon. Cheryl K. Hendrix (Filed Jan. 31, 1995)

NOW COMES Petitioner, through counsel undersigned, and respectfully requests that this Honorable Court grant this Motion to Rehear the dismissal of the Post Conviction Relief Petition for the reasons stated in the attached Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 31st day of July, 1995.

By /s/ Jan J. Raven
JAN J. RAVEN
Attorney for Petitioner

MEMORANDUM OF POINTS AND AUTHORITIES

Appellant seeks rehearing of two of the issues raised in this Honorable Court's Petition for the reasons advanced in his Petition and for the following further reasons.

I. Newly Discovered Evidence.

In its decision regarding Petitioner's claim of newly discovered evidence this Honorable Court concluded that the evidence was not newly discovered because it originally came to light in July, 1990. To constitute newly discovered evidence the evidence must have existed at the time of trial but be discovered after trial. Rule 32.1(e)(1), Arizona Rules of Criminal Procedure. This evidence was discovered in July, 1990, after trial. (Exhibit 1 attached to Petition) Admittedly it may have been discovered in sufficient time to raise this argument in a motion for new trial. However, Petitioner contends that if he is precluded from arguing that that evidence was newly discovered, then he is precluded from doing so because his trial counsel was not diligent in raising this issue in a motion for new trial pursuant to Rule 24, Arizona Rules of Criminal Procedure. Accordingly, Petitioner asserts that he was further deprived of effective representation by this failure of trial counsel. *See, e.g., Strickland v. Washington,* 466 U.S. 668 (1984), *State v. Lee,* 142 Ariz. 210, 689 P.2d 153 (1984).

Petitioner further maintains that the fact that the paycheck was never found or cashed should be considered by this Honorable Court at a hearing at least on the issue of whether it requires resentencing in this case. Petitioner respectfully reminds this Honorable Court that he was sentenced to death in part because this Court found that he had murdered the victim for something of pecuniary value pursuant to A.R.S. §13-703(F)(5). (1/25/90, 25) Aside from the contention that Petitioner had stolen the check and/or proceeds of the check from the victim, there was also a contention that he had stolen a tee shirt from the victim.

There was, however, direct evidence from the friends of the victim that established that Petitioner was at the victim's home as an invited guest. (6/19/90, 49-50) In addition, one of the victim's friends testified that he was a very generous man. That witness had no problem concurring in the possibility that the victim had given the tee shirt that the Petitioner was wearing to him. 6/19/90, 67-68)[1] If Petitioner did not take the paycheck then he is essentially on death row for wearing the tee shirt of the victim, a tee shirt which may very well have been given to him rather than stolen.[2]

There is a reasonable likelihood that this evidence, if presented at sentencing, could have affected the outcome. *See*, Rule 32.1(e), Arizona Rules of Criminal Procedure; *E.g., State v. Bilke,* 162 Ariz. 28, 51, 52, 781 P.2d 28, 29 (1989), *State v. Cooper,* 166 Ariz. 126, 129, 899 P.2d 992, 995 (App. 1990). Accordingly, Petitioner is entitled to have this Honorable Court reconsider whether a sentence of death can properly be supported upon such speculative allegations of the commission of a de minimus theft.

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[1] Indeed, the tee shirt Petitioner wore may not even have been the victim's. It was only established that the common shirt that Petitioner wore was one like a shirt the victim had had at some time prior to his death. (6/19/90, 65) It would be even further attenuated for Petitioner to be put to death because he had the misfortune to have a tee shirt that was like one that the victim had owned.

[2] Petitioner was convicted of felony murder with an underlying felony of burglary. This is not a case of premeditated first degree murder.

II. Ineffective Assistance of Counsel at Sentencing.

It appears from this Honorable Court decision regarding the claim of ineffective assistance of counsel (Minute Entry pgs 3-4) that Petitioner's claim was denied at least in part in agreement with the State's position that Petitioner had waived his right to present mitigation evidence at sentencing. (*See,* State's Response to Petition for Post-Conviction Relief, pg. 15) Petitioner contends, however, that it is a corner stone of criminal law that a waiver of a right must be knowingly, intelligently, and voluntarily entered into. *E.g., Johnson v. Zerbst,* 304 U.S. 458, 464 (1938).

The sentencing transcript does not establish that Petitioner knowingly, voluntarily, and intelligently, waived his right to present mitigation evidence at trial. Rather it shows that Petitioner gave up that right, without thought, in the heat of anger at and frustration with his attorney during that particular proceeding. Moreover, the affidavit of Petitioner's sister submitted in support of his original petition (Exhibit 5) establishes that in addition to laboring under the weight of the criminal proceedings against him, Petitioner was also suffering the ongoing effects of various family crises that left him in a state of grief and concern for his immediate family members. Petitioner, therefore, contends that he has shown prima facie evidence that he did not knowingly, intelligently, and voluntarily waive his right to present mitigation evidence at trial.

Petitioner further contends that this Honorable Court erred by finding that he is precluded from raising this issue in his petition pursuant to Rule 32.2(a)(2). Counsel on appeal raised only one issue of ineffective assistance of counsel. That issue was whether it was error for trial

counsel to advise his client not to talk to the presentence writer. *State v. Landrigan,* 176 Ariz. 1, 8, 859 P.2d 111 (1993). The issues of ineffective assistance of counsel raised by Petitioner are separate from that single issue. Petitioner, therefore, contends these separate claims should not be precluded by appellate counsel raising one ineffective assistance of counsel argument that is unrelated to those set forth in the Rule 32 Petition.

Moreover, it was the law well before Petitioner's appeal was filed that claims of ineffective assistance of counsel must be raised first in the trial court and that appellate courts will consider them if raised first on direct appeal only if they are clearly meritless. *State v. Carver,* 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989), *State v. Marlow,* 163 Ariz. 65, 786 P.2d 395 (1989). The preclusion rule of Rule 32.2(a)(2), Arizona Rules of Criminal Procedure, also existed at the time Petitioner's appeal was filed. Accordingly, if Petitioner is precluded from raising this issue, as this Honorable Court found (Minute Entry dated July 20, 1995, at p. 4) then he is precluded because of ineffective assistance from appellate counsel and this Honorable Court must also consider this at hearing.

Petitioner respectfully requests that this Honorable Court reconsider its decision summarily dismissing his Post-Conviction Relief Petition and set this matter for an evidentiary hearing pursuant to Rule 32.8, Arizona Rules of Criminal Procedure.

RESPECTFULLY SUBMITTED this 31st day of July, 1995.

By /s/ Jan J. Raven
JAN J. RAVEN
Attorney for Petitioner

Copy of the foregoing pleading
mailed this 31st day of
July, 1995, to:

HON. CHERYL K. HENDRIX
Maricopa County Superior Court

JOSEPH T. MAZIARZ
Assistant Attorney General

JEFFREY T. LANDRIGAN
Petitioner

By /s/ Jan J. Raven
Jan J. Raven
Attorney

JAN J. RAVEN
P. O. Box 710
Phoenix, Arizona 85001
(602) 840-9118
State Bar Attorney No. 011676
ATTORNEY FOR PETITIONER

IN THE SUPERIOR COURT OF MARICOPA COUNTY, ARIZONA

STATE OF ARIZONA Respondent, v. JEFFREY TIMOTHY LANDRIGAN, Petitioner.	No. CR 90-00066 **Petition for Review in the Arizona Supreme Court**

NOW COMES Petitioner, through counsel undersigned, and pursuant to Rule 32.9, Arizona Rules of Criminal Procedure, respectfully requests that the Arizona Supreme Court grant this Petition for Review of the decision of Judge Cheryl K. Hendrix dated July 17, 1995, summarily dismissing the Post Conviction Relief Petition.[1]

I. SYNOPSIS OF MARICOPA COUNTY SUPERIOR COURT DECISION.

The trial court rejected Petitioner's claim that death qualifying the jury was improper holding that he was

[1] By Minute Entry dated September 8, 1995, Judge Cheryl K. Hendrix denied Petitioner's Motion for Rehearing of the dismissal of the post-conviction relief petition. (Appendix B)

precluded from raising that issue and finding that the questioning was proper. *State v. Landrigan*, CR 90-00066, Minute Entry dated July 17, 1995, pgs. 1-2 (Appendix A).

Petitioner's contention that there was newly discovered evidence entitling him to a new trial was dismissed by the trial

* * *

Petitioner the tee shirt he was wearing. (Appendix P)[3] In short, Petitioner is on death row for wearing a tee shirt like one of the victim's, a tee shirt which may very well have been given to him rather than stolen.

There is a reasonable likelihood that the newly discovered evidence, if presented at trial or at sentencing, could have affected the outcome of either proceeding. *See*, Rule 32.1(e), Arizona Rules of Criminal Procedure. *E.g.*, *State v. Cooper,* 166 Ariz. 126, 129, 899 P.2d 992, 995 (App. 1990), *State v. Bilke,* 162 Ariz. 28, 51, 52, 781 P.2d 28, 29 (1989). Accordingly, Petitioner is entitled to a new trial or to resentencing.

C. Ineffective Assistance of Counsel at Sentencing.

Under both the United States and Arizona Constitutions, "[t]he right to effective assistance of counsel is a

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[3] The tee shirt Petitioner wore may not even have been the victim's. It was only established that the common shirt that Petitioner wore was one like a shirt the victim had had at some time prior to his death. It would be even further attenuated for Petitioner to be put to death because he had the misfortune to have a tee shirt that was like one that the victim had owned.

fundamental right." *State v. Lee,* 142 Ariz. 210, 216; 689 P.2d 153, 159 (1984). *Accord, Strickland v. Washington,* 466 U.S. 668 (1984). The same standard is used to determine whether counsel was ineffective at sentencing as at any other stage of the proceedings. *E.g., Evans v. Lewis* 855 F.2d 631, 636 (9th Cir. 1988). Counsel has a duty to undertake reasonable investigations or to make a reasonable decision that particular investigation is unnecessary. *Strickland v. Washington,* 466 U.S. at 691. A claim of ineffective assistance of trial counsel requires proof that counsel's performance was deficient and that the defendant was prejudiced by that deficient performance. To establish deficient performance it must be shown that counsel's performance fell below an objective standard of reasonably effective assistance under the prevailing professional norms. To demonstrate prejudice it must be shown that but for trial counsel's deficient performance there is a reasonable probability that the result would have been different. *Strickland v. Washington, supra; State v. Nash,* 143 Ariz. 392, 694 P.2d 222 (1985); *State v. Lee, supra.* A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington,* 466 U.S. at 693-694. Prejudice analysis does not depend on whether the outcome of the proceeding would have been different. *Lockart v. Fretwell,* 133 S.Ct. 838 (1993). Analysis of the prejudice prong is directed to determining whether the proceeding was fundamentally unfair. *Id.* at 842. *See, United States v. Cronic,* 466 U.S. 648 (1984).

Petitioner contends that there were two ways in which trial counsel was ineffective at sentencing. First, counsel made arrangements to present mitigation evidence from Mr. Landrigan's biological mother and former wife. Mr.

Landrigan's mother was to testify concerning her use of drugs and alcohol during her pregnancy with Mr. Landrigan. Ms. Landrigan was to present testimony that Petitioner's prior conviction for second degree murder, had resulted from an altercation which was more in the nature of an act of self-defense to mitigate the impact of that conviction. At Mr. Landrigan's request those witnesses did not testify. There were, however, alternative sources of that information which were not explored by counsel. Mr. Landrigan's biological father, Mr. Darrell Hill was an available source of that information. He was not contacted by counsel. (Appendix Q) Mr. Landrigan's adopted sister, a registered nurse, was not contacted by counsel and she has had experience with Petitioner and as a professional with fetal alcohol syndrome. She was available and willing to testify on Petitioner's behalf in that regard. (Appendix R) As to the fact that there was evidence that Mr. Landrigan may have acted in self defense in the earlier case, there was the reported decision of the Court reversing his earlier conviction. *Landrigan v. State,* 700 P.2d 218 (Okla. 1985) (Appendix S)

Second, trial counsel was ineffective because he failed to explore additional grounds for arguing mitigation evidence. Petitioner's sister, Shannon Sumpter, would also have verified that their mother, Mrs. Landrigan, was an alcoholic and that her disease caused significant problems within the family which impacted adversely on Petitioner as he was growing up. Ms. Sumpter would have provided that information to the Court had she been contacted by counsel. She would, moreover, have provided additional information concerning familial problems which preceded the time of sentencing and which may have offered at least a partial explanation of Petitioner's conduct at sentencing.

(Appendix R) There was another source of mitigation evidence regarding Petitioner that is most significant and was not investigated. Petitioner's biological family demonstrates a long history of violent behavior. That history includes Petitioner's biological father, Mr. Darrell Wayne Hill, who was, at the time of Petitioner's trial and sentencing on death row in the state of Arkansas.[4] (Appendix T)

Research has long been conducted which recognizes that the propensity to commit violent acts may well have a biological component. When a biological component is added to the fact that Petitioner was raised in the dysfunctional home of an alcoholic and that he was very likely damaged by the prenatal alcohol and drug use of his biological mother, the propensity for violence becomes almost a certainty. Dr. Frank A. Elliott summarized this theory:

> "Although environmental factors contribute to violence, they are seldom its sole cause because behavior is a biosocial affair, the result of interactions between the brain, environmental situations, and endogenous drives. Thus, the nature of the brain's response to a stimulus depends on the confluence of both biological and environmental variables at ta particular moment. An unfavorable environment often operates selectively to produce antisocial behavior in certain individuals who are especially vulnerable by reason of inherited or acquired neurophysiological traits. Exclusively sociological theories fail to explain why hard-core criminal violence runs like a scarlet thread through the fabric of all societies, *in good*

[4] Mr. Hill was to be retried for that offense after reversal of his conviction. *See, Hill v. Lockhart,* 824 F.Supp. 1327 (E.D.Ark. 1993).

> *times and in bad, and affects all classes.* Nor do they explain why even in times of anomie, when violence spreads, it still involves only a relatively small portion of the population or why it is that many individuals who are exposed to criminogenic influences in early life do not become violent as adults, or why a significant number of people who have not been exposed to such influences do become pathologically aggressive." Elliott, Frank A. (1988), Violence: A product of biosocial interactions, 16 *The Bulletin of the American Academy of Psychiatry and The Law,* 133.

There are many reputable authorities which have recognized and studied the biological component of violent behavior. *See, e.g.,* Volavka Jan, M.D., Martell, Dan, and Convit, Antonio, M.D., (1992) Psychobiology of the Violent Offender, 37 *Journal of Forensic Sciences,* 237-251 (Appendix U [reference pages omitted]); Mednick, Sarnoff, Kandel, Elizabeth (1988) Congenital Determinants of Violence, 16 *The Bulletin of American Academy of Psychiatry & Law,* 101-109. (Appendix V).

Petitioner is a classic example of the case studies showing that violent behavior has a biological component. He was adopted as a baby and did not know his biological history until he himself was incarcerated in the state of Oklahoma. (Appendix R) As stated by Professor Lee Ellis regarding conclusions reached through such "persuasive" adoption studies, " . . . [E]vidence of genetic involvement in criminality is now approaching the limits of certainty."[5]

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[5] Marsh, Frank H. and Katz, Janet, (1985), *Biology Crime & Ethics,* Chapter 2, p. 81.

A sentence of death must be tailored to personal responsibility and moral guilt. *South Carolina v. Gathers,* 490 U.S. 805 (1989); *Emmund v. Florida,* 458 U.S. 782, 801 (1982). Where a defendant's crime is attributable to a disadvantaged background or emotional or mental problems the defendant is less culpable than one without the excuse. *California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). *See, also, State v. Wallace,* 160 Ariz. 424, 427, 773 P.2d 983, 986 (1989), *cert. denied,* 494 U.S. 1047 (1990). Due to ineffective assistance from trial counsel at sentencing, the sentencing court did not have a complete and accurate picture of Petitioner's background and could not tailor his sentence to his personal responsibility and moral guilt. Petitioner was entitled to an evidentiary hearing and the opportunity to establish his entitlement to relief on this basis. *State v. Sutton* 143 Ariz. 234 (App. 1984); *State v. Suarez,* 23 Ariz.App.,530 P.2d 402 (1975). The trial court denied Petitioner a hearing on this issue at least in part because it found that Petitioner had waived his right to present mitigation evidence at sentencing. (Appendix A, pgs. 3-4) However, waiver of a right must be knowing, intelligent, and voluntary. *E.g., Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). Petitioner did not validly waive that right. Rather he gave it up without thought, in the heat of anger at and frustration with his attorney. Moreover, in addition to laboring under the weight of the criminal proceedings, Petitioner was also suffering the ongoing effects of various family crises that left him in a state of grief and concern for his immediate family members. (Appendix R) Petitioner, therefore, contends that he has shown prima facie evidence that he did not knowingly, intelligently, and voluntarily waive his right to present mitigation evidence at trial. Petitioner also contends that the trial court erred by finding that he

was precluded from raising this issue in his petition pursuant to Rule 32.2(a)(2). Counsel on appeal raised only one issue of ineffective assistance of counsel concerning trial counsel's advice his client not to talk to the presentence writer. *State v. Landriaan,* 176 Ariz. 1, 8, 859 P.2d 111 (1993). The issues of ineffective assistance of counsel raised by Petitioner are separate from that single issue and should not be precluded. Moreover, it has long been established that claims of ineffective assistance of counsel must be raised first in the trial court and that appellate courts will consider them if raised first on direct appeal only if they are clearly meritless. *State v. Carver,* 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989), *State v. Marlow,* 163 Ariz. 65, 786 P.2d 395 (1989). The preclusion rule of Rule 32.2(a)(2), Arizona Rules of Criminal Procedure, also existed at the time Petitioner's appeal was filed. Accordingly, if Petitioner is precluded from raising this issue, he is precluded because of ineffective assistance from appellate counsel.

D. Court's Consideration of Presentence Report.

At sentencing the trial court considered a presentence report which contained a statement from the victim's brother unequivocally stating that his opinion was that a sentence of

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constitutionally imposed. *See, Callins v. Collins,* ___ U.S. ___, 114 S.Ct. 1127, ___ L.Ed.2d ___, (1994). *Contra, Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

F. Proportionality review is constitutionally required.

In *Salazar,* 173 Ariz. at 416-17, 844 P.2d at 583-84 (1992) *cert. denied,* ___ U.S. ___, 113 S.Ct. 3017 (1993), this Court rejected proportionality review. Appellant urges this Court to reconsider its holding because proportionality reviews provide the "heightened scrutiny" required in death penalty cases. *Mills v. Maryland,* 486 U.S. 367, 383-84 (1988) That review "hold[s] error and injustice to a minimum." *Salazar,* 173 Ariz. at 419, 844 P.2d at 586 (Feldman, C.J., concurring). *See also State v. White,* 168 Ariz. 500, 525-26, 815 P.2d 869, 894-95 (1991), *cert. denied,* 112 S.Ct. 1199 (1992) (Feldman, V.C.J., concurring).

V. CONCLUSION.

Petitioner, Jeffrey T. Landrigan, respectfully requests that this Honorable Court grant this Petition for Review and reverse the decision of the trial court summarily dismissing his Post Conviction Relief Petition and either remand for retrial or resentencing; or, remand for an evidentiary hearing pursuant to Rule 32.8, Arizona Rules of Criminal Procedure.

RESPECTFULLY SUBMITTED this 5th day of October, 1995.

By /s/ Jan J. Raven
JAN J. RAVEN
Attorney for Petitioner

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JEFFERY TIMOTHY LANDRIGAN, f.k.a. Billy Patrick Wayne Hill, Petitioner, vs. TERRY STEWART, et al., Respondents.	)	CIV-96-2367-PHX-ROS

AMENDED MEMORANDUM REGARDING MERIT CLAIMS

Petitioner Jeffery Timothy Landrigan, pursuant to an order of the Court,[1] offers his amended memorandum addressing the merits of the claims as alleged in the First Amended Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254 by a Person in State Custody ("First Amended Petition") that are now pending before the

[1] District Court Docket Entry No. ("Doc. No.") 68 at 40.

Court.[2] Also pending before the Court is Landrigan's Motion for Order to Allow Further Neurological Testing.[3]

I. Introduction.

Billy Patrick Wayne Hill, n.k.a. Jeffrey Timothy Landrigan, landed on death row and was

* * *

IV. Evidentiary hearing.

Landrigan is requesting an evidentiary hearing pursuant to Habeas Rule 8, so that he may present additional information to the Court which will further support certain allegations now pending. Landrigan will address the specific requests under the relevant claims. The authority for the Court to conduct an evidentiary hearing follows.

A. Relevant facts.

Landrigan was denied an evidentiary hearing in the state collateral proceedings. Landrigan's post-conviction petition contained five (5) claims, for relief and was supported by nine (9) fact-specific exhibits. Landrigan requested an evidentiary hearing.[306] Landrigan requested funding, *inter alia,* for an expert to evaluate evidence and

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[2] Landrigan has also filed Motion to Expand the Record Under Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts ("Rule 7 Motion"), a Motion for Discovery, and a Motion for an Evidentiary Hearing, along with the filing of his Response.

[3] Doc. No. 71.

[306] Td. at 137, p. 23.

offer testimony regarding fetal alcohol syndrome.[307] Landrigan sought this expert in order to demonstrate the adverse effects of substance abuse by the mother on the fetus during pregnancy. The superior court denied the motion for evidentiary hearing and denied Landrigan's petition seeking post-conviction relief.[308] In so doing, and rather than reviewing each claim; the superior court simply adopted the position set forth by the state in its response to Landrigan's post-conviction petition.

B. Argument.

The Supreme Court has established six circumstances under which a district court must provide a habeas petitioner an evidentiary hearing: (1) the merits of a factual dispute were not resolved in a state court proceeding; (2) the state court factual determination is not supported by the record; (3) the fact finding procedure used by the state was inadequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed in a state court proceeding; and (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing. *See Townsend v. Sain,* 372 U.S. 293, 312-13 (1963), *overruled on other grounds, Keeney v. Tamayo-Reyes,* 504 U.S. 1 (1992).[309] The *Townsend* factors were later codified in 28 U.S.C. § 2254(d). *Otsuki v. Dubois,* 994 F. Supp. 47, 50 n.2 (D. Mass. 1998).

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[307] Td. Dec. 5, 1995 at 124.

[308] Td. Dec. 5, 1995 at 140.

[309] *Keeney* overruled the fifth situation, *see, e.g., Chacon v. Wood,* 36 F.3d 1459, 1466 (9th Cir. 1994), which is not relevant here.

Under the former version of the habeas statute, a petitioner was entitled to an evidentiary hearing if he or she established one of the factors. *See id.* n.1.

Under the Anti-terrorism and Effective Death Penalty Act ("AEDPA"), codified in part in 28 U.S.C. § 2254, these factors are not listed. *See* 28 U.S.C. § 2254 (Supp. 1998). In addition, subsection (e) was added to section 2254. *See id.* This subsection provides that a district court is not required to hold an evidentiary hearing if the petitioner has "failed to develop the factual basis of his claim in State court proceedings." *Id.* § 2254(e)(2). Courts have held that this subsection applies only when the petitioner has, through his own actions, "failed to develop the factual basis of his claim." *Burris v. Parke,* 116 F.3d 256, 258-59 (7th Cir. 1997). In all other situations, courts continue to apply the *Townsend* analysis, *see, e.g., Totten v. Merkle,* 137 F.3d 1172, 1176 (9th Cir. 1998); *Spreitzer v. Peters,* 114 F.3d 1435, 1456 n.9 (7th Cir. 1997), and grant evidentiary hearings as long as the petitioner has met one of the *Townsend* factors.

In *Jones v. Wood,* 114 F.3d. 1002 (9th Cir. 1997), for example, the petitioner attempted to develop an ineffective assistance of counsel claim at the state court level, but the Washington Court of Appeals denied his collateral petition without an evidentiary hearing. *See id.* at 1012. Accordingly, the Ninth Circuit held that Jones did not "fail" to develop the factual basis of his claim. Rather, the Court reasoned, "he was never given the opportunity to do so . . . ." *Id.* Accordingly, the Ninth Circuit reversed the district court's refusal to grant an evidentiary hearing. *See id.* at 1013.

Similarly, in *Correll v. Stewart,* 137 F.3d 1404 (9th Cir. 1998), the petitioner diligently attempted to pursue his ineffective assistance of counsel claim in state court but failed through no fault of his own. There, the state "denied Correll's repeated request for an evidentiary hearing." *Id.* at 1413. The Ninth Circuit declared that "the state cannot now insist the obstacle it placed in Correll's path when he sought a state-court hearing and the means to present evidence at that hearing should again prevent Correll from securing a federal evidentiary hearing." *Id.* at 1414. *(citing Jones,* 114 F.3d at 1012-13).[310] The court reversed the district court's refusal to grant an evidentiary hearing. *See id.* at 1415.

Both *Jones* and *Correll* were pre-AEDPA cases. However, neither case would be decided differently under the AEDPA amendments to 28 U.S.C. § 2254. The statute now provides that a district court shall not hold an evidentiary hearing "[i]f the applicant has failed to develop the factual basis of his claim in State court proceedings," unless the petitioner can satisfy the further provisions of § 2254(e)(2)(A) & (B). As the post-AEDPA cases reveal, failure to develop the factual basis of a claim means that the deficiency of the record must be due to something the petitioner did or omitted.

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[310] *See also Grisby v. Blodgett,* 130 F.3d 365, 367-68 (9th Cir. 1997). The Ninth Circuit remanded for a determination as to whether, under the proper standard, an evidentiary hearing should be held on petitioner's claim that the prosecution failed to disclose a deal with its key witness. Because petitioner's proffered evidence suggested that the witness gave perjured testimony, the district should have considered the claim under the "any reasonable likelihood" standard.

In *Jones v. Wood,* the Ninth Circuit, while refusing to apply the AEDPA to the pre-Act case, pointed out that petitioner would be entitled to an evidentiary hearing under new §2254(e)(2).

> It is clear that Jones did not "fail[ ]to develop" the factual basis of either of his claims, rather, the state courts denied him the opportunity to develop the facts by failing to hold an evidentiary hearing. Where, as here, the state courts simply fail to conduct an evidentiary hearing, the AEDPA does not preclude a federal evidentiary hearing on otherwise exhausted habeas claims.

114 F.3d. at 1013.

The Seventh Circuit has espoused similar reasoning. In *Burris v. Parke,* the court explained that "[f]ailure implies omission – a decision not to introduce evidence when there was an opportunity, or a decision not to seek an opportunity," and that, "[t]o be attributable to a 'failure' under federal law the deficiency in the record must reflect something the petitioner did or omitted." 116 F.3d at 258.

Rejecting the district court's reading of §2254(e)(2), the Seventh Circuit declared that "the word 'fail' cannot bear a strict-liability reading, under which a federal court would disregard the reason for the shortcomings of the record." *Id.* The court therefore determined that "§2254(e)(2) does not matter to this case," since petitioner was erroneously denied an opportunity to develop facts in state proceedings. *Id.*

The Third Circuit also agrees with the Seventh and Ninth Circuits. In *Love v. Morton,* 112 F.3d 131 (3rd Cir. 1997), the Third Circuit also had the occasion to interpret §2254(e)(2). It held that:

> [s]ection 2254(e)(2) applies to applicants who "failed to develop the factual basis of a claim in State court proceedings." In this case, Love did not "fail" to develop the basis of his claim. * * * Under the [] circumstances [of this case] we are unwilling to conclude that Love failed to develop the factual basis of his claim in the state court proceedings. We conclude that factors other than the defendant's action prevented a factual record from being developed. *See* Statement by President William J. Clinton Upon Signing S.1965, [opining that §2254(e)(2) is not triggered when some factor that is not fairly attributable to the applicant prevented evidence from being developed in State court]. Although the President's statement is not evidence of congressional intent, we refer to it because we agree with his interpretation of the plain language of §2254(e)(2), and we find no contrary interpretation in the legislative history of the 1996 amendments to §2254.

Id. at 136.

Thus, the Circuits that have addressed the issue have uniformly held that, in order to "fail" to develop the factual basis of his claim, the habeas petitioner must do or not do something that causes the deficiency in the record. This was the rule before the passage of the AEDPA and remains the rule after its passage.

C. Landrigan did not "fail" to develop his factual claims and is therefore entitled to an evidentiary hearing.

Where the state procedure was inadequate to afford the petitioner a full and fair hearing, the district court

must hold an evidentiary hearing on habeas review. *See Townsend,* 372 U.S. at 312-13.

Here, by refusing to hold an evidentiary hearing, the state court's procedures were inadequate to provide Landrigan a full and fair opportunity to litigate the claims in state court. Landrigan did not "fail" to develop the factual basis for his claims. Any deficiency in the factual record is not due to anything Landrigan did or did not do. Rather, the deficiency is due to the state's refusal to hold an evidentiary hearing. The state's refusal does not bar Landrigan from obtaining an evidentiary hearing. To hold otherwise would allow the state to preclude collateral attack in federal habeas proceedings simply by denying evidentiary hearings in its courts. *See Burris,* 116 F.3d at 259. But, "[n]othing in § 2254(e) or the rest of AEDPA implies that states may manipulate things in this manner." *Id.*

Landrigan sought collateral relief pursuant to Ariz. R. Crim. P. 32 in the Maricopa County Superior Court. Landrigan requested an evidentiary hearing.[311] During post-conviction proceedings in state court, Landrigan, *inter alia,* requested funding for an expert to evaluate evidence and offer testimony regarding fetal alcohol syndrome.[312] Landrigan sought this expert in order to demonstrate the adverse effects of substance abuse by the mother on the fetus during pregnancy.

The state filed a reponse stating that three of the claims were precluded, one was frivolous and one was

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[311] Td. Dec 5, 1995 at 137, p. 23.

[312] Td. Dec. 5, 1995 at 124.

waived.[313] The state's response was not supported by evidence or documents outside of the trial court record. The state also opposed Landrigan's request for the appointment of experts.[314]

The superior court denied the motion for evidentiary hearing and denied Landrigan's petition seeking post-conviction relief.[315] In so doing, and rather than reviewing each claim, the superior court simply adopted the position set forth by the state in its response to Landrigan's post-conviction petition.

Landrigan submitted evidence to support his request for an evidentiary hearing. Although the evidence he presented to the state post-conviction court went a long way toward establishing constitutional violations, it was necessary for the evidence and testimony to be further developed through the normal discovery process and an evidentiary hearing – a process available to other litigants in state court where much less is at stake. Discovery and an evidentiary hearing would have permitted Landrigan to present to the state court a fully completed picture of what went wrong during the trial.

In this case the State of Arizona has prevented the factual development of Landrigan's constitutional claims in the state post-conviction courts. The failure to allow Landrigan to fully develop his allegations in state court rendered that procedure inadequate. "[T]he state cannot now insist the obstacle it placed in [Landrigan's] path

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[313] Td. Dec. 5, 1995 at 138, pp. 10-18.

[314] Td. Dec. 5, 1995 at 125.

[315] Td. Dec. 5, 1995 at 140.

when he sought a state-court hearing and the means to present evidence at that hearing should again prevent [him] from securing a federal evidentiary hearing." *Correll v. Stewart,* 137 F.3d 1404, 1414 (9th Cir. 1998). Landrigan is now entitled to develop and litigate the factual basis for his federal constitutional claims in federal court. Landrigan will address specific instances in which an evidentiary hearing is necessary at Part V, *infra.*

V. Response to specific claims.

A.

In his first claim for relief, Landrigan alleged that the death qualification of the jury by the trial court violated his rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

1. Relevant facts.

Landrigan objected to the trial court questioning members of the venire about their views on the death penalty.[316] Despite this objection, the trial court made the following inquiry to the members of the venire.

> Are there any of you here that have strong feelings concerning the death penalty whereby you would tend to avoid finding a defendant guilty knowing that the possible punshment (sic) could be death?
>
> * * *

[316] Td. Dec. 4, 1990 at 40.

> Is there anyone here that has strong opinions concerning the death penalty, with your opinions being so strong it might influence the way you view the evidence in this case?
>
> Is there anyone here who would prefer not to sit as a juror because of the nature of the charges?[317]

The trial court made this inquiry despite the fact that in Arizona, the trial judge, and not the jury, determines the sentence.[318]

Sixteen jurors expressed a preference to not serve on the jury due to the fact that death was a

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he will inquire as to policies for funding in the Office of Maricopa County Public Defender in 1989 and 1990. Testimony will be taken pursuant to Fed. R. Civ. P. 30.

The factual information Landrigan seeks has not been previously presented. On direct appeal, Landrigan was limited to the record of the trial proceedings. In collateral proceedings, Landrigan sought an evidentiary hearing and the state court denied his request. *See* Part II(Z)(1) and (2), and Part IV, *supra*. The state procedure was inadequate to afford the petitioner a full and fair hearing.

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[317] TR Jun. 18, 1990 (I) at 58-59.

[318] *See Ariz.* Rev. Stat. § 13-703(B), *see also* TR Jun. 18, 1990 (I) at 58.

6. An evidentiary hearing is necessary.

Landrigan requested an evidentiary hearing in state collateral proceedings on his claim of ineffective assistance of counsel. The state court, without comment, denied Landrigan's request for an evidentiary hearing.

To obtain an evidentiary hearing on an ineffective assistance of counsel claim in this Court, a habeas petitioner must establish that (1) his allegations, if proven, would constitute a colorable claim, thereby entitling him to relief and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts. *See Jones v. Wood,* 114 F.3d 1002, 1010 (9th Cir. 1997); *Hendricks v. Vasquez,* 974 F.2d 1099, 1103 (9th Cir. 1992).

If the petitioner has failed to develop material facts in state court proceedings, he or she must demonstrate adequate cause for his or her failure and actual prejudice resulting from that failure. *See Keeney v. Tamayo-Reyes,* 504 U.S. 1, 11 (1992). To fulfill the "cause" requirement, the petitioner must demonstrate that he "tried and failed through no fault of his own to develop the facts relevant to his ineffective assistance claim at the state court level in the only permissible manner." *Jones,* 114 F.3d at 1012-13; *Correll v. Stewart,* 137 F.3d 1404, 1414 (9th Cir. 1998). The *Tamayo-Reyes* prejudice requirement is co-extensive with the prejudice prong of *Strickland. See Correll v. Stewart,* 137 F.3d at 1414.

The actions of the state court cannot divest a petitioner of any meaningful opportunity to present evidence at the state level.

> When a state court denies an evidentiary hearing on a colorable ineffective assistance of counsel claim after proper request, a habeas petitioner

> has fulfilled the *Tamayo-Reyes* "cause" requirement. Simply put, the state cannot successfully oppose a petitioner's request for a state court evidentiary hearing, then argue in federal habeas proceedings that the petitioner should be faulted for not succeeding.

Correll v. Stewart, 137 F.3d at 1413.

Landrigan has alleged facts that, if taken as true, constitute a colorable claim of ineffective assistance of counsel. In addition, Landrigan has "'undermine[d] confidence in the outcome of his sentencing, thereby establishing the requisite Strickland prejudice." *Correll,* 137 F.3d at 1413, *citing Strickland,* 466 U.S. at 694-96. Accordingly, this Court should conduct an evidentiary hearing, as Landrigan has sufficiently set forth a claim of ineffective assistance of counsel and resulting prejudice.

At the evidentiary hearing, Landrigan will offer the testimony of Dennis Farrell, Landrigan's trial counsel. Landrigan intends to seek testimony regarding Mr. Farrell's qualifications, experience, credentials; and the investigation conducted in preparation for the trial and sentencing phases of Landrigan's case. Landrigan will also put forward the testimony of an attorney who is qualified to represent persons in capital proceedings to offer proof of the standards Mr. Farrell was required to meet under the first prong of *Strickland.*

In order to establish prejudice, Landrigan intends to offer the testimony of Dr. Thompson, *inter alia.* Dr. Thompson, who is qualified as an expert, will testify regarding Landrigan's organic brain dysfunction, which pre-dated the crime; Landrigan's family history; the genetic factors and the in utero exposure to alcohol that

contributed to the neurobiological dysfunction; as well as to Landrigan's competency to assist in his own defense at trial and sentencing. Dr. Thompson will explain in detail the reasons for his conclusion that Landrigan had brain dysfunction well before the crime. In addition, he will testify as to the validity, reliability, and general professional acceptability of the testing methods he employed. Finally, Dr. Thompson will offer a more thorough and detailed explanation of Landrigan's brain impairment and its subsequent effects on his behaviors.

D.

In the seventh claim for relief, Landrigan alleges his rights to have a jury determine the existence of mitigating circumstances and take part in the sentencing decision as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were violated.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA (Phoenix Division)
No. 2:96-cv-02367-ROS

[Caption Omitted In Printing]

Motion To Expand The Record Under Rule 7
Of The Rules Governing Section 2254 Cases

The exhibits on the following pages were filed with the Court as a part of this Motion on November 17, 1998 and entered on November 18, 1998.

MICKEY MCMAHON, Ph.D.
Clinical & Consulting Psychologist
5150 N. 16th St., Suite A-122
Phoenix, AZ 85014
(602) 997-6315

PSYCHOLOGICAL REPORT

Name: Landrigan, Jeffrey T. (AKA: Page, Jeffrey D.)
CR 90-00066 Date: 7/15/90

Referral: The client was referred by his attorney, Dennis Farrell in regard to a death sentence hearing.

Documents Reviewed: The following documents were sent to me by defense counsel and reviewed as part of this evaluation:

> Phoenix Police DRs, #89-186504
> Forensic Assessment Form as part of Attorney/Client Communications

Offense: The client was convicted of first degree murder in the death of a homosexual who was attempting to seduce him.

Background Information: The client was born on 3/17/62. Nine months after his birth, he was placed with foster parents who he later came to call mother and father.

He understands that his birth mother was a drug abuser, injecting amphetamines among other things. His birth father had done time in prison and had a history of physically abusing mother, even trying to kill her on three occasions, according to what mother told the defendant.

Foster mother sounds like a serious alcoholic from what the client told me: She drank Seagram 7 every day, primarily in

the evenings. She would get home from work around 5:00pm and "be passed out by 9:00pm on the couch." However, she got up and went to work the next day, working for Phillips Petroleum for 15 years.

Mother also sounds like a prescription drug addict in that she took prescription "tranquilizers" every day from as early as the client can remember as a young child.

The only time the client can remember not getting slapped was during the summer when he and his mother went to visit the maternal grandmother in Texas. Mother eliminated her drinking and never slapped the client during the time she was around grandmother.

While at grandmothers, the client's life was dramatically improved. Grandmother was a "great cook" and would always treat him with wonderful food. When the client left home at age 16, he went to Texas and spent a great deal of time with grandmother. Although he moved out into his own place after a week or so, he went to visit her every other day, ate her good cooking, and sat around talking to her about life and how to live it. Since grandmother always cooked more than they needed, he was able to "feast" at home and have something to eat there as well. Grandmother died three days before the client escaped from the Oklahoma prison.

Foster father was not abusive like mother but would go get her a bottle of whisky when she wanted it. He, himself, did not abuse alcohol or drugs, according to the client. There were arguments with mother but that usually involved mother doing all the screaming.

The client was involved in a number of traumatic experiences early in his life that undoubtedly are related to the

murders he has been convicted of. For example, being slapped by his foster mother as a standard form of discipline when she was continually drinking could not have helped but make a significant impact on his future development.

In addition, the client's history includes a number of potentially traumatic, life-threatening events when he was a young boy and did not have the adult psychological defenses to deal with them that he later developed.

For example, he saw a boy shot in the chest when he was only 13 years of age. When the client first recalled that event (when asked what was the earliest age he could remember seeing anyone killed) his voice noticeably cracked and there was a slight stammer, indicating that even though 15 years have passed since the incident, and he has been witnessed other violent events, he still has an automatic, normal reaction to accessing that first experience of the death of another human being. In addition, even though he and some friends self-medicated the trauma by going out and drinking some more, he still had flashbacks for a number of mornings, upon awakening.

At age 14, the client had another potentially traumatic event happen to him when someone pointed a gun at him in a argument at another party. The assailant was drunk and so was unpredictable with the gun in his hand, adding to the potential psychic trauma the client incurred. The client admits that his heart was pounding in his chest and he stammered in his speech. He did not feel like he had much of a reaction to it during the incident (as is his typical way of psychologically defending himself), although he admits there was a delayed reaction afterwards.

He handled that by increasing his drinking and socializing.

Again, at age 14, the client was hospitalized by his father when he wouldn't get out of bed and kept sleeping after taking quaaludes. While in the hospital he had an allergic reaction to the mediation he was prescribed and/or the withdrawal from the quaaludes: He acted in a bizarre way, kept falling down, and threw things through windows.

At age 17, he saw a man, who had been run over, laying dead on the freeway and had a "spooky feeling" come over him even though he did not know the man.

As part of his religious orientation, he has heard people speak in tongues, which is a typical occurrence in the charismatically oriented churches. However, he has had some visions and/or illusions of the devil, hallucinating the devil's face with flames being drawn on his face. At the time he volunteers that he was taking amphetamines. It is well-known that amphetamine abuse, particularly if prolonged, such as the client's has had, will typically produce such hallucinations, even delusions.

Drug & Alcohol History: The client stated that he began drinking at age 10 when he sneaked alcohol out of his mother's Seagram 7 supply; however, he didn't like the taste. At age 12, he began to drink beer on Friday and Saturday nights in rural Oklahoma with other boys his age, generally a 6-pack. At age 13, he began to drink whatever alcohol was on hand, liquor or beer. By age 16, he and four or five friends would drink almost every night, beginning around 3:00pm and quitting around 11:00pm in the evening. That pattern continued until he was sentenced to prison in Oklahoma in 1981 for possession of marijuana.

When he got out of prison after approximately one year, he got married, had a child, and generally drank about 3-4 times per week with his buddies and his wife. He continued this pattern for approximately one year before he was sentenced to a 40 year prison term for murder within approximately one year.

At age 14, he began to abuse speed and acquired a life-long preference for it among the drugs he has tried in the past. The longest he has abstained from abusing amphetamines since age 14 has been "several months." In fact, he states that he did speed every day for the 42 days from the time he escaped from the Oklahoma prison to the time he was taken into custody in Phoenix. He goes on to admit that he only slept 14 days out of the 42 he was out, which could not help but have had an effect on his behavior at the time of the commission of the present murder charge. Finally, he admits that he "snorted" amphetamine about one and one-half hours prior to the offense and estimates that he was at the "peak" of the drug effect at the time of the offense itself.

In addition, he has also abused marijuana quite extensively for over 16 years, at the rate of "at least once a week."

Psychological Findings: The results from the clinical interview, records review, and psychological testing (Rorschach, Williamson Sentence Completions) revealed the following picture, relative to the two murders the client has been convicted of:

The client was drinking, along with the victim, when he became involved in the Oklahoma murder for which he was sentenced to a 40 year term. According to him, he had been drinking beer from approximately 10:00am to 8:00pm

and was at a party. The victim had been a drinking buddy. They started out just horseplaying around, but it got out of hand and they became angry at each other. According to the client, the victim "grabbed me by the throat and pushed me up against a wall." The client pulled out a "buck knife" and told the victim to get out of the way so his wife and he could leave. The victim said, "Come on, let's see you leave"! The client then stabbed him.

It should be noted that one week previous the client was beaten up by 5 Espanics who used a club. During the fight, the client hit one of them with a bottle and knocked him out. His buddies took him away, but then came back looking for the client. They went so far as to kick the door down and come in with "claw hammers". The client said that he had no doubt in his mind that they wanted to kill him. However, the client held them at bay with a pistol.

To precisely what degree these life-threatening events had on the client's behavior when he murdered the man that had grabbed him by the throat is up for debate. However, it is hard to believe that it did not have a significant effect when he was again manhandled only a week later by the man he eventually killed in Oklahoma.

In fact, he states that he did speed every day for the 42 days from the time he escaped from the Oklahoma prison to the time he was taken into custody in Phoenix. He goes on to admit that he only slept 14 days out of the 42 he was out, which could not help but have had an effect on his behavior at the time of the commission of the present murder charge. Finally, he admits that he "snorted" amphetamine about one and one-half hours prior to the offense and estimates that he was at the "peak" of the drug effect at the time of the offense itself.

It would appear that the trigger for the client's hitting the victim, prior to his crime partner choking him to death, was the victim making homosexual advances to him and ultimately touching him and rubbing his neck. The client admits that the next thing that happened was that he had the thought to just subdue the victim, cut off his unwelcome homosexual advances, and let his partner in through the front door so that they could carry out the original plan to simply rob the victim – which he did. The client admits to one previous homosexual experience in prison in which another inmate paid him to submit to oral sex. Afterwards the client had a negative reaction as if he "felt dirty, not a right feeling." He admitted that the reaction continued to be with him, "bothering me for a while."

According to the client, after he let his partner in, the partner began kicking the victim which galvanized the victim to get up and begin struggling with the partner, even starting to get the upper hand. The client volunteers that he then put the victim in a head lock, and his partner hit him until he was unconscious. The client went back to robbing the place, his original intention, while the partner took an electric cord and began to choke him to death.

Afterwards, the client and his partner left the apartment, having obtained a payroll check and a small amount of cash.

The results from the clinical interview and psychological testing do not reveal any evidence of a major mental illness of the psychotic or bi-polar variety. In addition, there do not appear to be any indications of mental retardation or mental deficiency. Of course, there is ample evidence of the existence of the following diagnoses:

Amphetamine Dependence, Alcohol Abuse, and an Antisocial Personality.

In addition, although the client does not have any current symptoms of Post-Traumatic Stress Disorder, the existence of multiple psychic traumas in his past related to life-threatening experiences have undoubtedly played a major role in his adulthood behavior, i.e. he has learned how not to be abused by others and so is not likely to demonstrate the degree of weakness, anxiety, or depression that one would expect to see in someone who was currently suffering from the classic symptoms associated with Post-Traumatic Stress Disorder.

In general, the client does have good psychological controls and is not prone to sudden explosive behavior, regardless of whether the explosion is provoked or not. However, he has adapted to living in the sometimes violent world of a state prison and so appears, on the surface, to demonstrate less sensitivity to the needs of others than someone who had not adapted to such a life.

Conclusions: Given the above data, there would appear to be a number of mitigating factors that the sentencing authority would want to consider before pronouncing sentence, particularly a death sentence:

> The defendant had been on amphetamines for 42 straight days prior to the offense, 28 of those days going without sleep. Certainly, he was somewhat "paranoid" being on escape status, but the typical effects of continuous and prolonged abuse of amphetamines is genuine paranoia. Although not an affirmative offense of insanity, it is a factor that could have diminished the defendant's capacity to utilize good judgment, given the circumstances of the current offense.

Certainly, he did not use good judgment in the selection of his crime partner, the decision to rob the victim, and the impulse to hit the homosexual victim when he was touched in an unwelcome homosexual way.

Although the defendant could conceivably have attempted to interfere with his partner's choking the defendant, being high on amphetamines and focused on obtaining money and valuables did not allow him much time to consider that as a possibility. In addition, being on escape status from Oklahoma also acted to focus him on obtaining money and not causing potential difficulty with his partner by interfering with his behavior. Undoubtedly, such a situation also acted to prevent him from dialing 911 for help.

The client's abusive background with a drug abusing birth mother and a birth father who abused her, plus an alcoholic foster mother who slapped him as a typical form of discipline, combined with going through a number of life-threatening situations from age 13 on, even including being beaten with a club by five Espanics one week previous to committing the murder on which he was sentenced in Oklahoma, to leave the client with an extremely difficult upbringing to overcome.

In addition, there is every likelihood that the client's birth mother was abusing amphetamines when he was in her womb prior to birth. There is ample research to show that some individuals who prefer amphetamines have an excess of the nerurotransmitter, dopamine, in their brain and prefer being even more alert, fast-thinking, and "high," through the abuse of amphetamines. Although I certainly do not have lab tests showing that mother was indeed on amphetamines during pregnancy, we do have the fact that the client is excessively attracted to amphetamines as his

favorite drug of abuse. He may very well have acquired that predisposition in his mother's womb or through the simple process of inheriting it through her genetic makeup.

/s/ Mickey McMahon, Ph.D.
Mickey McMahon, Ph.D.
Clinical Psychologist

Declaration by Thomas C. Thompson

Thomas C. Thompson declares under penalty of perjury the following to be true to the best of his information and belief:

1) I am a certified psychologist licensed to practice in the State of New Mexico. A copy of my *curriculum vitae* is attached as Exhibit A. My area of specialization is Forensic and Neuropsychological Psychology. I have been qualified as an expert in other capital cases based on my credentials, experience and investigation in New Mexico, Arizona, and Texas.

2) I have been retained by counsel for Jeffrey T. Landrigan for the purpose of determining whether Mr. Landrigan suffers from a neuropsychological disturbance that produced severely disordered behavior.

3) Clinical neuropsychology is the science of the interaction between brain functioning and behavior. The neuropsychologist uses the client's historical and familial history, personality features, cognitive functioning, and evidence of brain injury or dysfunction to diagnose, explain, and treat the client's maladaptive behaviors.

4) In preparation for the clinical interviews and the neuropsychological evaluation, I had an opportunity to review material related to Mr. Landrigan and his family, supplied to me by Mr. Landrigan's counsel. I conducted extensive interviews of Mr. Landrigan, his father Darrel Hill, his adoptive sister Shannon Sumter, his ex-wife Sandra Martinez, and his biological daughter Jane Doe (a minor). In addition, I reviewed psychological, psychiatric, medical, educational, social, criminal, and family

background material related to Mr. Landrigan and his biological and adoptive families.

5) This evaluative process also included a review of the relevant literature. I surveyed the literature in the areas of forensic psychological evaluation, neuropsychological evaluation, the effect of prenatal and early postnatal experience on later cognitive and behavioral outcomes, and reviewed the behavioral genetic literature relevant to the issue of Antisocial Personality Disorder and also drug and alcohol abuse. The review focused on the literature that was available at the time of the initial psychological consultation performed on Mr. Landrigan in 1990 as well as current literature. The review highlighted the inadequate nature of the original psychological evaluation in terms of the lack of personality, cognitive, and neuropsychological data gathering. In addition, the review underscored the importance of relevant background information (particularly prenatal and early postnatal variables, family development, and behavioral genetic) in understanding and explaining Mr. Landrigan's long-standing disordered behavior. The bibliography is attached as Exhibit B.

6) On October 12 and 13, 1997, I interviewed Mr. Landrigan at the Arizona State Prison Eyman Complex SMU-II in Florence, Arizona. At that time I conducted a clinical interview.

7) On December 10, and 11, 1997, and January 30 1998, I again met with Mr. Landrigan. At those meetings, I conducted a neuropsychological examination. I performed the tests listed in Exhibit C.

8) Based on interviews, records, testing, and an extensive literature search, I was able to compile a thorough case study on Mr. Landrigan.

1990 psychological impressions.

9) As part of the case study, I also reviewed a document, dated July 15, 1990, prepared by Mickey McMahon, Ph.D., entitled "psychological evaluation." I had an opportunity to interview Dr. McMahon, who is a clinical psychologist.

10) In 1990, Mr. Landrigan's trial attorney asked Dr. McMahon to meet with his client and give the attorney his "impressions" of Mr. Landrigan. At the direction of the attorney, Dr. McMahon prepared a "psychological report" based on his brief interview with Mr. Landrigan. It is, in fact, a summary of his findings but would not be considered an adequate psychological evaluation. A copy that report is appended to my declaration at Exhibit D.

11) An analysis of the original document prepared by Dr. McMahon shows a significant number of glaring deficiencies by the standards recognized by forensic psychologists at that time. The document and procedures used fell short of a comprehensive evaluation and were inadequate to address the issues of mitigation.

12) The standard of practice in the area of forensic evaluation by a psychologist is governed by the American Psychological Association's principles of ethical conduct. Those areas relevant to the performance of forensic psychological evaluations include the following:

a) That psychologists base their forensic work on appropriate knowledge of and confidence in

areas underlying such work, which includes specialized knowledge concerning special populations.

b) That psychologists practicing in this area provide written or oral reports concerning the psychological characteristics of an individual only after they have conducted an examination of the individual adequate to support their statements or conclusions.

c) That psychologists maintain a reasonable level of awareness of current scientific and professional information as it relates to activities within their practice and that they undertake ongoing efforts to maintain competency in these areas. Further, psychologists must rely on scientifically derived knowledge and maintain an adequate level of awareness of relevant scientific and professional information related to the services they render, making appropriate use of scientific and professional resources to do so.

d) That psychologists, when performing evaluations using limited data, explain in the report, verbal communication and/or testimony the limited nature of the evaluation and its effects on the reliability and validity of their conclusions.

13) Dr. McMahon did not conduct a thorough psychological evaluation of Mr. Landrigan. As a result, his "impressions" and the prepared document did not meet the standards of practice for a comprehensive forensic psychological and neuropsychological evaluation and would not have been useful in the matter of sentencing.

14) Dr. McMahon reviewed only two documents. One was a report from the Phoenix Police Department, and it was externally generated with regard to information

relevant to the crime. The second document appears to be a questionnaire prepared by an unidentified individual. No other sources of background information were consulted, other than Mr. Landrigan.

15) Dr. McMahon administered only the Rorschach Inkblot Technique and the Williamson Sentence Completion Test, both of which are considered primarily personality measures and not adequate tests to address the issues relevant to the sentencing hearing. Consequently, Dr. McMahon was unable to generate adequate data to meet the standards necessary for the evaluation of Mr. Landrigan.

16) The standard of practice for a forensic psychological evaluation at that time and currently, particularly in a death-penalty sentencing/mitigation evaluation, dictates the gathering of a wide range of background information. The information should include details about the commission of the crime, but also about Mr. Landrigan's birth and his developmental, familial, educational, social, medical, cognitive, and substance-abuse history. In addition, it is not sufficient to derive this information solely from Mr. Landrigan. The standard of practice recommends that collateral and corroborative information be gathered from accessible parties, including family members, teachers, prior counselors, psychologists, physicians, and other individuals, who have intimate and relevant knowledge of Mr. Landrigan. This information is traditionally gathered during personal interviews or from appropriate records. At the very least, an evaluation of this nature and in this situation should have included a more thorough history from multiple sources, a relevant family history of both the biological and the adoptive

family, and an overview of previous psychological, psychiatric, and medical records.

17) In 1990, when Dr. McMahon conducted his interview, a comprehensive forensic psychological evaluation should have included a Halstead-Reitan Neuropsychological Battery, which was readily available and widely used (Reitan and Wolfson, 1985, 1986, 1986b, Grant and Adams, 1986 and Lezak, 1976, 1983). In addition, the majority of other neuropsychological instruments, used to augment the Halstead-Reitan Neuropsychological Battery in the 1997-98 evaluation, were also available at the time of the 1990 evaluation (Lezak 1976, 1983).

18) For purposes of a psychological report, testing relevant to the issues of personality and adaptive functioning should have been empirically based, as opposed to a mere impressionistic evaluation. Objective interpretation of the Rorschach Inkblot Technique, as a valid measure of personality, was already well established and standardized in Exner's work (1974, 1978, 1986), thus eliminating the need for subjective interpretations. In addition, the Minnesota Multiphasic Personality Inventory (MMPI) originally developed in the 1940's, had already emerged as the most widely used and thoroughly researched personality instrument available. It, too, was readily available in 1990 and easily administered. Abundant sources, including Dahlstrom, Welsh, and Dahlstrom (1972, 1975), and Greene (1980) documented almost 6,000 clinical and research applications of the MMPI; therefore, interpretation of test results using the MMPI-I or MMPI-II were highly standardized. Furthermore, by 1990 Millon (1977, 1987a, 1987b) had developed the Millon Clinical Multiaxial Inventories, which were also widely available, reliable, and valid

personality measures and were far more empirically based than any impression-based evaluation could be.

19) At the time of the 1990 interview, Dr. McMahon was asked by Mr. Landrigan's attorney to only provide his impressions, which he thought was an unusual request based on his previous forensic experiences. Later, given the initial instructions, Dr. McMahon was surprised when the attorneys wanted a report. Dr. McMahon, himself, felt there was an excessive number of questions about Mr. Landrigan that could not be addressed based solely on information gathered during a brief consultation. Summarily, Dr. McMahon described his experience working with Mr. Landrigan's attorney as the "worst experience" he had ever had working with an attorney. He characterized the attorney's request for a psychological evaluation as if the attorney was robotically going through a "to-be-checked-off list."

20) Consequently, the document prepared by Dr. McMahon contained many shortcomings for a forensic evaluation and was inadequate to address mitigating factors prior to the imposition of the death penalty.

1997 – 1998 case study.

21) As part of the case study, commenced in 1997 and completed in 1998, I conducted a comprehensive neuropsychological, developmental, and behavioral evaluation. The vast quantities of relevant data and the significant results of this evaluation, as well as the pertinent literature research, could have been gathered in 1990 and presented at that time as mitigating factors in Mr. Landrigan's sentencing hearing.

22) In order to have an understanding of Mr. Landrigan, it is imperative to look to his family history and background. Mr. Landrigan has two families: his birth family, the Hills; and his adoptive family, the Landrigans. To better understand the backgrounds of the families, I have included a genogram for the Hill Family, Exhibit E; and a genogram for the Landrigan family. Exhibit F.[1] The significant behaviors and disorders for relevant family members are noted.[2]

Family Background and History

23) Many members of the biological father's family display behaviors that are disordered.[3] Mr. Landrigan's biological grandfather abandoned his family, abused drugs and alcohol, engaged in criminal behavior, and was eventually killed by the Tulsa police. His biological grandmother manifested attachment difficulties. She gave birth to three children out of wedlock, all of whom were given up for adoption. Mr. Landrigan's paternal uncle has a history of disordered behavior characterized by alcohol and substance abuse as well as a long-standing pattern of criminal behavior. He is currently incarcerated in a federal penitentiary . Mr. Landrigan's biological father demonstrated a pattern of early behavioral disturbances

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[1] A legend for understanding the genogram is attached at Exhibit G.

[2] In the event a disorder or behavior is not noted, it does not mean that the individual does not possess the traits identified. I chose to focus on certain individuals so that the genogram will be more clear. The disorders and behaviors are briefly summarized in Exhibit H.

[3] The summaries provided in my declaration are based upon records I reviewed, interviews I conducted and declarations that I have read.

characterized by shallow relationships, alcohol and substance abuse, and criminal behavior, including violence. He is currently on death row in the state of Arkansas. Had Mr. Landrigan been raised in this family, his own behavioral pattern might have been attributed to social learning; however, Mr. Landrigan never knew the members of this family. Nevertheless, he inherited the genetic predisposition for disordered behavior from his biological family. *See* Exhibit E.

24) Mr. Landrigan's biological mother also manifested a pattern of disordered behavior characterized by alcohol and substance abuse, criminal behavior, and abandonment of Mr. Landrigan at the age of six months, when she left him in a day nursery and never returned. Mr. Landrigan's mother, herself, was orphaned as a young child after the death of her mother. Her father married five times and her oldest brother, at the time of her placement in an orphanage, was already in a juvenile detention facility. *See* Exhibit E.

25) The relationship between Mr. Landrigan's biological parents was marked by alcohol and drug abuse and mutually disordered behavior. During his mother's pregnancy, she used alcohol and amphetamines. After giving birth, she exhibited inadequate maternal attachment, frequently leaving other family members to provide his early postnatal care. Finally, she abandoned Mr. Landrigan at six months in a day nursery in Tulsa, and eventually she relinquished custody of Mr. Landrigan to the state of Oklahoma.

The Landrigans.

26) Mr. Landrigan's adoptive family knew nothing of his background but, his adoptive sister noted, his behavior never seemed to fit into the family. Furthermore, his early attachment difficulties were amplified in his adoptive family as a result of the adoptive mother's affective disturbances and chronic alcoholism. Mr. Landrigan never responded to discipline and social teaching within the family. His behavior became increasingly disordered as he emerged into adolescence and adulthood. According to his adoptive sister, Mr. Landrigan never developed any attachment as a child and manifested a superficial self-centered relationship which became more evident with each passing year. Mr. Landrigan's behavior significantly changed the family dynamic for the worse. His behavior probably interacted with his adoptive mother's personality in such a way as to severely exacerbate her problems with alcohol and depression. He began getting into trouble and using alcohol and drugs at an early age and, by adolescence, he had begun a series of placements in juvenile detention facilities, a psychiatric ward, and twice in drug abuse rehabilitation programs. Finally, as a young adult, he was incarcerated in Oklahoma for murder. His sister noted and the records confirm that Mr. Landrigan was unable to learn from his behaviors and failed to anticipate or respond to consequences. *See* Exhibit F.

Neuropsychological and personality testing

27) The results of the neuropsychological evaluation that I conducted reflect an individual who shows poor language-based learning with difficulties in the way in which verbal material is organized, retrieved, and stored.

the auditory verbal learning tests, verbal memory tests and significant differences between verbal and nonverbal/visual memory.

28) I also noted that Mr. Landrigan's motor functioning was consistent with difficulties in the anterior dominant (left) language hemisphere, further supporting the hypothesis of a dysfunction of this area of the brain. In addition, one also notes a lack of strategy across many of the tests that were administered. This is especially true on the Category Test, where Mr. Landrigan's performance was in the impaired range suggesting difficulties in reasoning, ability to profit from feedback and problems in hypothesis testing. What this means is Mr. Landrigan has difficulties in reasoning, forming useable strategies, and profiting from feedback. Because of the brain dysfunction, Mr. Landrigan has deficits in the way that he functions in situations requiring him to organize his behavior in a more routine fashion.

29) The results of the personality testing are consistent with the noted neuropsychological difficulties. The testing reveals an individual with significant long standing personality problems that are manifest in deficits with cognitive processing, poor adaptability, incomplete understanding of his surroundings and his effect on others, and very limited impulse control. As a result he engages in behavior in a more inflexible fashion and he fails to apply experiences from past situations to new situations. Mr. Landrigan's evaluation indicates that he is suffering from an Antisocial Personality Disorder.

30) Antisocial Personality Disorder, according to the DSM-IV, is characterized by a pervasive pattern of violations of the rights of others, beginning before age 15. It

must be distinguished from criminal behavior undertaken for gain that is not accompanied by the personality features characteristic of this disorder. These characteristics are seen in a pattern of shallow interpersonal relationships, lack of interpersonal connectedness, being deceitful, consistently irresponsible across areas of their daily lives with decisions characterized by impulsivity and a failure to plan ahead. The decisions that are made by these individuals occur on the spur of the moment without forethought, or anticipation of consequences to self or others. Antisocial Personality Disorder is more common among the first-degree biological relatives of those with the disorder that among the general population. Biological relatives of individuals with this disorder are also at increased risk for substance abuse related disorders, particularly in males. Adopted-away children resemble their biological parents more than their adoptive parents but the adoptive family environment influences the risk of developing a personality disorder and related psychopathology.

31) These behaviors are consistent with evidence from scientific literature concerning the way in which individuals with Antisocial Personality Disorder ("APD") process emotional and linguistic information. Studies involving sophisticated neuroimaging (EEG, MRI, SPECT, and PET scans) and neuropsychological testing have revealed that these individuals show alterations in both brain structure and functioning. They simply do not process information in the way others do. They lack the ability to respond to the environment in a normal fashion. They are less sensitive to both physical and emotional signals. Therefore, individuals with APD do not adequately profit from punishment and feedback alone.

32) Williams, *et al.* (1991) and Kiehl, *et al.* (in press) found significant differences between normal control subjects and APD subjects using electroencephalographic(EEG) recordings. When faced with emotion-laden words, APD subjects displayed lower physiological responsivity and less verbal comprehension than did normal subjects. These findings were further demonstrated by Intrator, *et al.* (1997) in a study using single positron emission computerized tomography (SPECT). In this study, the brain activities of normal subjects were compared with those of APD individuals, while each were engaged in reading emotion burdened materials. The authors uncovered significant abnormalities in those areas of the brain implicated in verbal and emotional processing in APD individuals. Hare (1998), using functional magnetic resonance imaging (fMRI), reported that APD individuals show much greater cortical activity than normals when trying to comprehend the emotional content if verbal materials. He concluded that these findings reveal a biological deficit.

33) Utilizing positron emission tomography (PET) evaluation of central nervous system glucose metabolism, Raine, *et al.* (1994)(1998) found significantly reduced activity in several areas of the prefrontal cortex in murderers relative to control subjects. These findings are consistent with those of Lapierre, *et al.* (1995) on APD subjects. These researchers found similar areas of lowered brain activity as measured by SPECT neuroimaging and confirmed with neuropsychological testing.

34) Other studies (Arnett, *et al.* 1993; Ogloff and Wong, 1990; Raines and Venables, 1988; Patrick, 1994; and Patrick, *et al.* 1993) of psychophysiologic patterns of arousal have shown marked differences between APD and

normal individuals. These studies reveal lower levels of arousal which result in biological deficits in these individuals These deficits alter emotional arousal and interfere with normal learning. Consequently, these affected individuals are particularly slow to learn from punishment or past experiences.

35) Damasio, *et al.* (1991) noted their research findings strongly support a biological developmental condition among APD individuals in which behavioral deficits are due to a dysfunction of specific regions of the nervous system. Their findings are confirmed by data from studies similar to those noted above. Certainly, research by Patrick (1994), Patrick, *et al.* (1993), and Raine, *et al.* (1990) strongly supports these findings. These researchers were able to demonstrate that psychophysiologic measures, (*i.e.*, electrodermal, cardiovascular and cortical measures), taken at age 15, could correctly predict which individuals would develop APD nine years later, by age 24.

36) These findings are consistent with the interpretation of the relevant literature concerning neuropsychological/neurobehavioral dysfunction and APD by Thompson (1997). The literature supports a pattern in APD that is consistent, behaviorally, with a biological disturbance in prefrontal cortical/subcortical functioning.

37) The neurobehavioral pattern that emerges is characterized by deficits in behavioral inhibition, inability to learn using negative feedback/aversive consequences, failure to learn from experience, the absence of realistic long-term goals, and inappropriate/defective affective language processing. Consequently, these individuals are unable to learn from past experiences, anticipate future consequences, or generalize their experiences into an

organized body of knowledge that can serve to guide their behavior in an adaptive fashion. Although appearing intellectually normal, these individuals process information in an incomplete manner that results in a life long history of disturbed behavior.

38) The result is an individual whose functioning appears to be solely bound by the present circumstances in which they find themselves with no reflection on the past nor anticipation of future consequences.

39) After conducting the above described interviews and assessment measures, examining records, and reviewing the family history of the Hills and the Landrigans, I determined that four areas of inquiry are particularly relevant in understanding Mr. Landrigan's behavior and aberrant brain functioning: the behavioral genetics of temperament and personality; the effects of prenatal exposure to alcohol and amphetamines (*i.e.*, Fetal Alcohol Syndrome); the developmental consequences of the disruption of early maternal attachment and subsequent abandonment; and assortative mating (the concentration of disordered and antisocial traits in subsequent generations).

Genetic determinants of behavior.

40) I focused on these areas because Mr. Landrigan's family background is replete with individuals with seriously disordered behavior including, among others, a father who has been paranoid, violent, addicted to alcohol and amphetamines, and whose personal life history is marked by early and continuous episodes of disordered behavior and failures in adaptive functioning. *See* Exhibit E. Additionally, Mr. Landrigan was exposed to alcohol in

his mother's womb as a result of his mother's daily alcohol consumption during her pregnancy. Shortly after Mr. Landrigan's birth, his biological mother abandoned him and he was then placed for adoption. From a very early age with the adoptive family, Mr. Landrigan exhibited behaviors that were indicative of failures to develop attachments, poor social adjustment, an inability to anticipate consequences, failure to learn from experience, along with a pattern of impulsive and self defeating behaviors, including significant addiction to amphetamines and cocaine. He has been unable to develop adaptive social behaviors throughout his life.

41) At the time of the psychological evaluation in 1990, there were a large number of well-organized studies using the adoption model. In an adoption study, an individual is separated from his biological family and his behaviors are evaluated for greater similarities to the biological or adoptive family in order to differentiate genetic contributions from imitative behavior. Cloninger, *et al.* (1981), Cloninger, *et al.* (1986) and Cadoret, *et al.* (1980) and a review of the more recent literature by Anthenelli and Schuckit (1997); all support the role of genetic factors in alcohol abuse. Based on a review of brain reward mechanisms by Gardner (1997), a similar pattern of genetic predisposition is found for other types of substance abuse. An examination of the genogram of Mr. Landrigan's biological family, *see* Exhibit E, reflects an extremely widespread and prevalent pattern of alcohol and substance abuse.

42) Other well organized studies in the area of genetics, crime, and antisocial personality disorder provide significant support for the role of genetics. These studies, which were conducted in the United States as well as

Denmark and Sweden, (*i.e.*, Cadoret *et al.* (1983); Cadoret *et al.* (1985); Cadoret *et al.* (1987); Mednick *et al.* (1984); Moffitt (1987); Mason and Frick (1994); Miles and Carey (1997); Eaves, *et al.* (1997); and McGue and Buchard (1998)), support genetic pre-disposition as a variable in criminal behavior. The studies examined children who had been adopted and, therefore, were not exposed to their biological parents who, themselves, had a history of criminality. The findings of these studies support previous evidence gathered in twin studies showing a significant correlation between biological relatives regardless of their exposure to one another. As with the variable of alcohol and drug abuse, an examination of the genogram from Mr. Landrigan's biological family shows a significant genetic loading for Antisocial Personality Disorder. *See* Exhibit E.

Pre-natal development and damage.

43) Mr. Landrigan's biological mother used alcohol, amphetamines and amphetamine-derivative inhalants during her pregnancy. The biological mother's behavior during her pregnancy influenced Mr. Landrigan's later neurocognitive development. As noted in Reynolds and Fletcher-Jansen (1989), the formation of higher cortical processes begins in very early development. Damaged development is characterized by unmatured neural organization and poor patterns of myelination within the brain. A number of variables, including timing, nutrition, environment, teratogenicity (*i.e.* alcohol, drugs), and genetics affect brain development.

44) The effects of *in utero* exposure to drugs, alcohol, and other teratogenic substances on the central nervous system was already well-known in 1990. These teratogenic

agents have been linked to a number of both subtle and obvious physical, cognitive, behavioral, and emotional sequelae. Streissguth, *et al.* (1989) studied 500 children, 92 of whom had been prenatally exposed to alcohol. They concluded that the effects of even moderate exposure to alcohol could be distinguished in the very first phase of life and continued to exert negative influences throughout development.

45) Relevant literature concerning the use of stimulants during pregnancy (Middaugh, 1989, Oro and Dixon, 1987, Eriksson, *et al.* 1978, Eriksson, *et al.* 1981 and Finnegan and Kandall, 1997) reveals findings consistent with neurochemical changes in the brain. These changes are further exacerbated by reduced prenatal care and result in increased incidents of low birth weight, neurological abnormalities, and long-term aggressive behavior and other problems in adjustment and adaptation.

46) Although Mr. Landrigan does not manifest the obvious external features associated with Fetal Alcohol Syndrome (FAS), current research by Mattson, *et al.* (1998) demonstrates that prenatal alcohol exposure is related to a consistent pattern of neuropsychological deficits, regardless of the presence or absence of the physical features of FAS.

47) Specifically, as revealed in interviews with Mr. Landrigan's adoptive sister, Ms. Shannon Sumter, a graduate nurse, she noted that her brother's behavior fit the pattern of deficits associated with this disorder. Many of these deficits relate to the ability to plan, control, and when necessary inhibit behavior. As such, they are clearly relevant to understanding Mr. Landrigan's condition.

Post-natal and early development.

48) At the age of six months, Mr. Landrigan was abandoned by his biological mother in a day nursery. Prior to that time, Mr. Landrigan had experienced a variety of care givers as he was shuffled around within the extended family. When the State of Oklahoma took custody of Mr. Landrigan, he continued to experience an unstable environment and changing care givers as he moved through foster placements and eventual adoption.

49) Attachment is a key variable in the majority of acceptable theories of developmental psychopathology. Attachment is an important variable in cognitive, social, emotional, and personality development. Information about Mr. Landrigan's early childhood, gained from extensive, in-depth interviews with Ms. Shannon Sumter, Mr. Landrigan's adoptive sister, along with extensive clinical interviews with Mr. Landrigan, is consistent with an individual who failed to show the ability to bond or develop significant, normal emotional attachments. These difficulties were obvious at an early age and continued to be amplified as Mr. Landrigan matured. Corroborative information from Mr. Landrigan's ex-wife, Ms. Sandy Martinez, confirms that Mr. Landrigan always lacked depth of emotional attachment and connectedness. Raine, *et al.* (1997), noted that *in utero* complications and maternal rejection are significant factors in the more serious forms of violent behavior, particularly where this behavioral disruption is characterized by early onset. In addition, being raised in a public institution beginning during the first year of life is a key factor in maladjustment. All of these factors are developmental variables which impacted Mr. Landrigan and were known prior to 1990.

50) Interviews with family members, such as the adoptive sister, as well as the adoptive mother and father, both of whom were alive in 1989 and 1990, would have revealed a history characterized by difficulties in the maternal-child relationship. Interviews with Ms. Sumter, Mr. Landrigan's adoptive sister, revealed a pattern of interactions between Mr. Landrigan and his adoptive mother, during which his diminished capacity for bonding/connectedness and disordered behavior interacted with her temperament and personality in a negatively reinforcing fashion. These difficulties became quite severe over time as the adoptive mother's alcoholism progressed to the point where she died of complications associated with alcoholism. *See* Exhibit F.

51) The significance of this developmental history is supported by the work of Rowe (1994) and Xiaojia, *et al.* (1996). This research sustains the concept of an active genotype-environmental interaction in which individuals largely mediate the response of the environment to themselves based on their behavior. Xiaojia, *et al.* (1994) found that psychiatric disorders of biological parents are significantly related to and inducing of children's antisocial/hostile behaviors. In essence the resulting interaction between Mr. Landrigan and his adoptive mother became a mutually negatively reinforcing relationship which served to amplify the disordered behavior of both and left no possibility for any amelioration of Mr Landrigan's personality.

Assortative mating.

52) The variable of assortative mating, *i.e.*, nonrandom mating (Krueger, *et al.* 1998) is extremely relevant

and easily observable in Mr. Landrigan's biological family. In essence, assortative mating means certain individuals become attracted to one another based upon mutual behaviors. This attraction results in a non-random pattern of mating. The data from Krueger, *et al.* (1998) strongly supports the role of assortative mating in antisocial behaviors. This pattern is well-known to psychologists working with individuals with Antisocial Personality Disorder and their families. The effects of this concentration can be observed in the Landrigan biological family. Many members of the family possessed similar behavioral traits, marked by poor inhibition, hyperactivity, alcoholism, drug abuse, and antisocial behaviors. *See* Exhibit E.

53) The pattern is also evident in Mr. Landrigan's ex-wife as well as in their biological daughter, who, at the age of 15, has already been placed in a treatment program for behaviorally disordered adolescents. Based on interviews, behavior evaluations, and psychological testing of the daughter by program personnel, she presents with problems of substance abuse, disordered behavior, and the beginnings of criminal activity. *See* Exhibit E.

54) The concentrating effects of assortative mating appear so strong that Mr. Landrigan's adoptive family, which was more supportive and emotionally benign, had little, if any, effect on the defendant and his developmental outcome. This nurturing limitation is well supported and argued by Rowe (1994) in his book THE LIMITS OF FAMILY INFLUENCE.

Conclusion

55) These data taken together suggest an individual whose behavior was disordered early in life as a result of

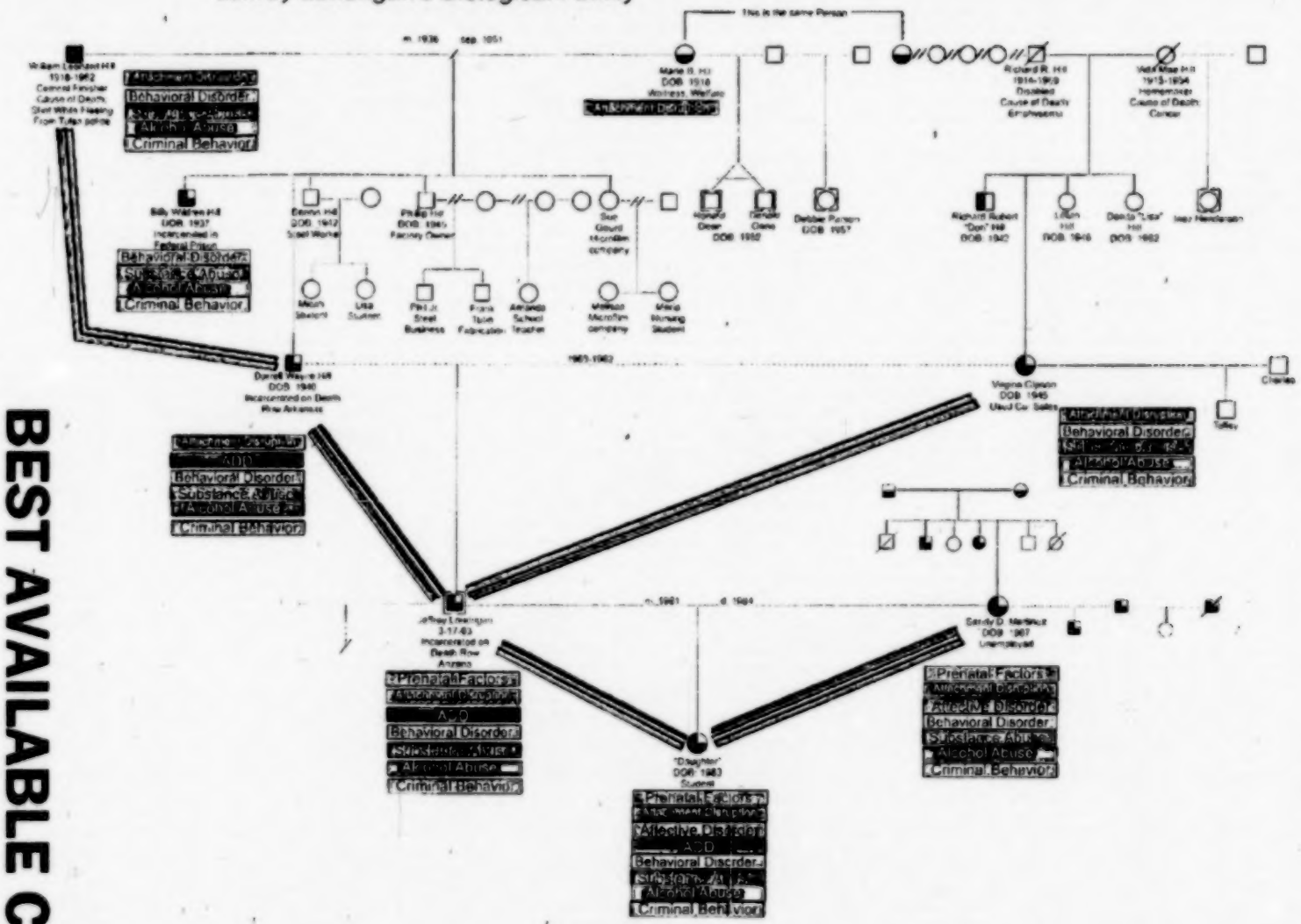
genetic predisposition, *in utero* teratogenic substances, early maternal rejection, and a negatively reinforcing mother-child relationship arising from a troubled genotype-environmental interaction in the adoptive family. The extent of this disordered behavior was subsequently beyond the control of Mr. Landrigan. His actions did not constitute a lifestyle choice in the sense of an individual operating with a large degree of freedom, as we have come to define free will. The inherited, prenatal, and early developmental factors severely impaired Mr. Landrigan's ability to function in a society that expects individuals to operate in an organized and adaptive manner, taking into account the actions and consequences of their behaviors and their impact on society and its individual members. Based on evaluation and investigation along with other relevant data, this type of responsible functioning is simply beyond Mr. Landrigan and, as far back as one can go, there is no indication that he ever had these capacities.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 6th day of November, 1998 at Las Cruces, New Mexico.

/s/ Thomas C. Thompson
Thomas C. Thompson

Jeffrey Landrigan's Biological Family



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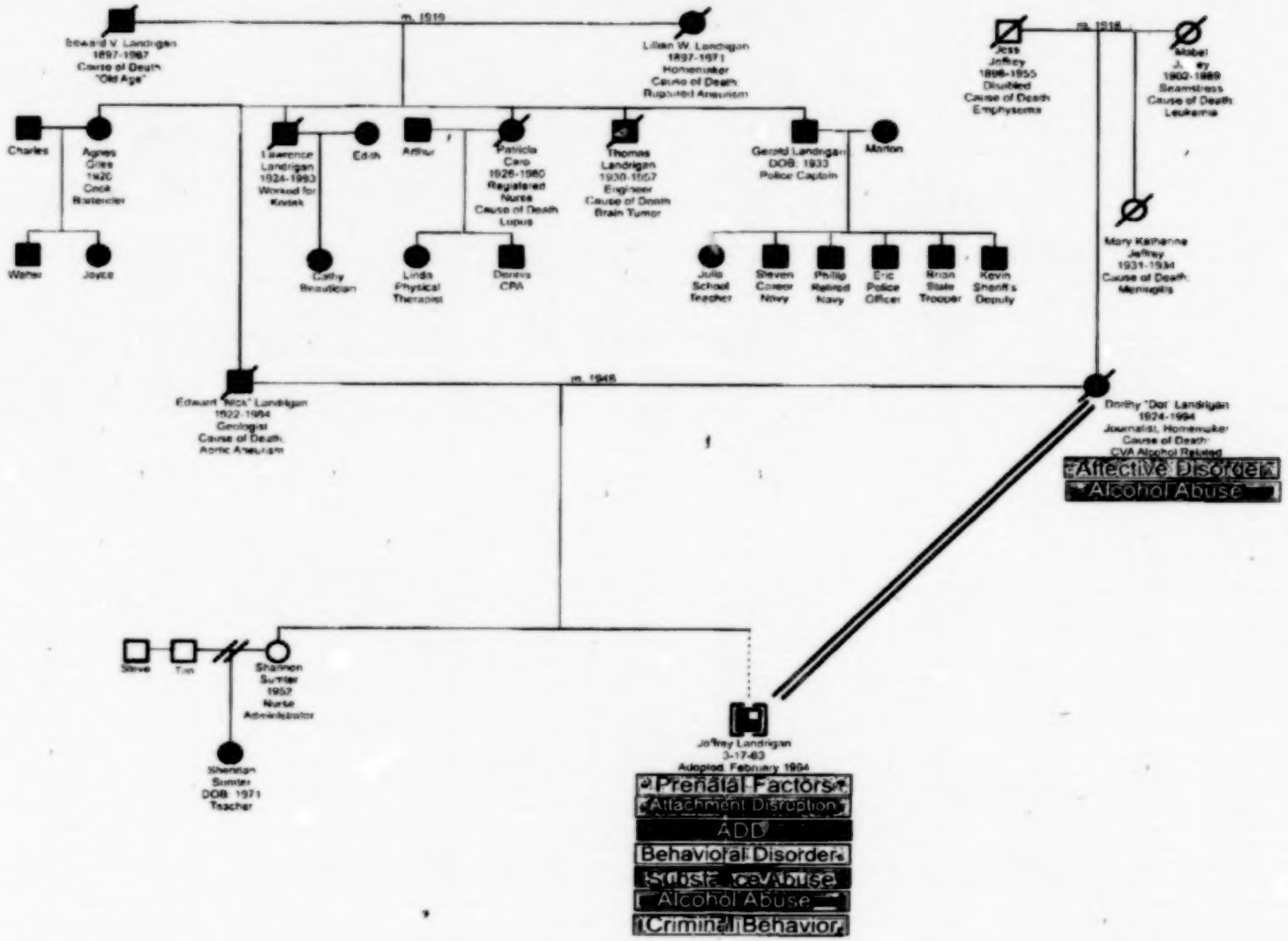
Jeffrey Landrigan's Adoptive Family



Declaration by Lisa Eager

I, Lisa Eager declare under penalty of perjury the following to be true to the best of my information and belief:

1. My name is Lisa Eager and I am an investigator with the Office of the Federal Public Defender. I am assigned to the Capital Habeas Unit in Phoenix, Arizona. I am the investigator assigned to the Jeffrey Landrigan case.

2. During my investigation in the Landrigan case, I met and interviewed Mr. Landrigan's biological mother, Virginia Gipson (f.k.a. Letha Virginia Hill), in Hot Springs, Arkansas. I interviewed Virginia on June 11, 1997; July 11, 1997; September 4, 1997, and August 9, 1998.

3. Virginia stated that her parents were Vida and Richard Hill. Her paternal grandfather, Napoleon Bonaparte Hill, was 3/4 Native American and a member of the Cherokee Nation. The Cherokee part of the family was from Oilton and Muskogee. He was married to Richard's mother, Emma Mitton Hill. She was Irish. Virginia said that her mother was married to someone else, name unknown, before she married Richard. Inez Henderson was her half-sister from her mother's first marriage but Virginia has no contact with her.

4. Virginia said that she was nine years old when her mother died from cancer. After her mother's death, the entire family drove out to Bakersfield, California, to live with Richard Hill's sister, Mildred Jones. Virginia said that her father took all of the money that he'd received after his wife's death to California and paid for his sister's house. He thought that if he helped his sister that she

would in turn help them. Richard Hill thought that he and his family could all live with his sister and her family. Mildred Jones had five children and a disabled husband. Mildred did not want Richard and his family to live with her. A few months after going to Bakersfield, Richard and his family returned to Tulsa on the train.

5. Virginia said that her father tried to raise his children on his own when they returned to Oklahoma. Richard Hill applied for welfare. Richard Hill's health was poor and their family doctor, Dr. Robert Rupp, thought that Richard had only six months to live. Social Services suggested taking Virginia and her sisters to live someplace else, someplace where they would be busy. Virginia and her sisters were sent to live at the Charles Page Orphanage in Sand Springs, Oklahoma. Virginia said that it was a large orphanage and indeed, they were busy. The orphanage had farms that the children worked on in order to earn their way. Virginia's brother, Don, was not sent to the orphanage. He was allowed to live at home initially and was later placed in a correctional facility.

6. Virginia said that while she lived at the Sand Springs Orphanage she was able to see her sister Jeanne but that they lived on different floors. Virginia and Jeanne were not allowed to see their youngest sister, Lisa, because she lived in the little girls' section of the orphanage.

7. Virginia said that she attended Charles Page High School in Sand Springs but did not graduate. When Virginia was in the eleventh grade she still could not read well. When she was with Darrel Hill, he taught her to read.

8. Virginia said that her father, Richard, remarried at least four times after her mother died in an attempt to

find a step-mother for his children. The first marriage only lasted around three months before they divorced. The second marriage was to a woman in Arkansas and was also short-lived.

9. Virginia reported that when she was a teenager her father married Marie Hill. Richard and Marie were married to each other more than once. Marie Hill became like a mother to Virginia. Marie had several miscarriages and she also gave up three children for adoption. A family friend, Josephine, adopted Marie's daughter, Debbie. The other two children that were given up for adoption were twins.

10. Virginia became better acquainted with Marie Hill's son, Darrel, after her father and Marie were already married. Shortly after Darrel was released from the Oklahoma state prison, he raped Virginia. Virginia told Marie what happened and as a result, Virginia's father and Marie split up for several months. It was not until approximately four months later that Virginia saw Darrel again.

11. Virginia next saw Darrel Hill at her fifteenth birthday party at Marie Hill's house. Richard and Marie were still spending time together even though they had split up. Darrel gave Virginia a dress for her birthday and told her that he was going to take her to Miami, Oklahoma, to marry her.

12. Virginia said that she ran away from the orphanage in Sand Springs to marry Darrel Hill. They were married in Miami, Oklahoma. During the time that they were together, Darrel did not work. Virginia reported that Darrel stole cars and robbed safes instead of working. He also drank whisky with beer chasers and used speed.

Virginia said that Darrel also used a speed-like drug called Valo. The first time Virginia saw Darrel shooting up, they were already married. Virginia's father wanted to have their marriage annulled after that but Darrel threatened to kill him so he did not pursue the annulment.

13. Virginia said that Valo was a nasal inhaler that Darrel, his friends and she used. They opened the inhaler to get to the cotton inside. The cotton had an oily substance in it that they cooked and injected. Virginia said that she always wears long sleeves now to cover up the scars from track marks that she has on her arms.

14. Virginia said that the first time she drank moonshine was when she found it in a jelly jar inside their mailbox. She found moonshine like this more than once and each time that she found it she drank the whole thing.

15. Virginia said that she got pregnant with Billy about six months after she married Darrel. Virginia admitted that during the time that she was pregnant that she drank alcohol on a daily basis. She drank hard liquor – whiskey and moonshine – which she would sneak from Darrel.

16. When Billy was one month old, Darrel and Virginia lived in an apartment for about a month. An incident occurred in which Darrel loudly told Virginia that he had a lady friend and that he was taking Billy. Darrel acted crazily and severely beat Virginia. Darrel then locked Virginia in a closet and refused to let her out. Darrel left the apartment after the landlord came in and said that he had called the police. Virginia stated that the landlord let her out of the closet. When Darrel returned to the apartment later that night, he passed out.

17. In the past, Virginia's mother-in-law/step-mother, Marie Hill, had told her if Darrel ever beat her that she should roll him up in a blanket and beat him with a skillet or a bat. Virginia reported that on that night she rolled Darrel up in a blanket and beat him as Marie had instructed. She stayed up all night crying and her mother-in-law/step-mother, Marie Hill, picked her up the next day. Marie was proud that Virginia had used her idea.

18. Virginia said that Darrel had been physically abusive to her at other times as well. He once held a gun to her head until she passed out. On another occasion, he hit her in the mouth.

19. Virginia said that when Billy was a few months old that Darrel went back to prison. Virginia lived with Darrel's mother, Marie, some of this time. To the best of Virginia's recollection, she kept Billy for two months and then gave him to her Aunt Delta and her husband, Bill, because Virginia knew that she couldn't raise Billy. Billy had double pneumonia and was colicky. He was very sickly the whole time that she had him and she could not afford to pay for the medical attention that he needed. At that time she had been staying with her paternal grandmother, Grandma Hill, for only a few days when Grandma Hill kicked her out. Virginia said that when she asked Darrel's parents for help with the baby that they left town. Virginia said that her Aunt Delta had Billy for two months before someone called Social Services and said that the baby was not hers. They took the baby away from her.

20. When Social Services took Billy away, Virginia stated that she met with a Judge Young in Tulsa, Oklahoma, to discuss the situation. Virginia stated that she did not want to give Billy up but she was told by Judge Young

that she was not a good mother, that she was only seventeen years old, and that they had a couple who wanted a baby and were willing to pay $10,000 if she signed her baby over. Virginia reported that Judge Young stated she had already spoken to Virginia's father about the arrangement. Virginia stated that she did not want to give up her baby but that she was told she had no rights. She reportedly asked Darrel's family for help but they left town.

21. Virginia said that the Social Services worker that handled the adoption was Harold Arrowood. She said that she ultimately agreed to give Billy up for adoption but that her family never saw any of the $10,000. Virginia said that she'd heard that Harold Arrowood attended a lot of cocktail parties that Nick and Dot Landrigan threw at their home. Virginia further stated that years later when she spoke to Nick Landrigan that he admitted this to her and said that Harold Arrowood had been an acquaintance of theirs.

22. Virginia said that she spent seven years in a fog, abusing drugs and alcohol. She used speed and then yellow jackets to bring her down.

23. Virginia said that when she met her current husband, Charlie, they moved to Arkansas in 1972. Virginia and Charlie worked at National car rentals. Virginia said that they dated for a year and split up. When Virginia found out that she was pregnant, they got back together and moved to Indiana. When her son Tolly was eight months old, Virginia and Charlie moved out to Arizona. Charlie opened his own auto garage.

24. Virginia said that after she gave Billy up for adoption that she did not have any contact with him until

1988. She was living in Yuma, Arizona, at the time. Virginia said that she received a telephone call from Darrel's sister, Sue Gourd. Mrs. Gourd said that Billy was going to call her. Virginia said that around one hour later she did receive a call from Billy. He introduced himself to her as Jeff Landrigan and explained to her that he located her because a man in prison named Tommy Owens walked up to him and asked him if he was Darrel Hill's son. Virginia said that she grew up with Tommy Owens and they talked from time to time after that. Virginia said that she eventually went out to Oklahoma and met Jeff while he was in prison in Hominy, Oklahoma.

25. Virginia said that Jeff told her when they spoke that he had been able to do whatever he wanted growing up, including drinking alcohol.

26. Virginia said that Jeff telephoned her when he escaped from prison in Oklahoma. She reported that she felt torn because she wanted to help him but she also wanted to turn him in. She said that she did not see Jeff until he was in custody in Phoenix, Arizona. Virginia saw Jeff before and after his trial in Phoenix.

27. Virginia said that she was contacted several times by Jeff's trial attorney, Dennis Farrell. She said that there seemed to be a communication problem with Jeff and Mr. Farrell. Mr. Farrell acted like Jeff's case was cut and dry. When Virginia was contacted by Mr. Farrell she was never asked any questions regarding their family history. Virginia said that she spent a total of about two hours with Dennis Farrell. She said that she was never interviewed by any investigators before the trial.

28. Virginia said that she was never contacted by attorneys or investigators appointed to represent her son

on direct appeal or in post-conviction proceedings. She said that had any attorney or investigator contacted her, she would have disclosed the information stated in this declaration, as well as other information.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 16th day of November, 1998.

/s/ Lisa M. Eager
Lisa M. Eager

Declaration by Philip Hill

I, Philip Hill declare under penalty of perjury the following to be true to the best of my information and belief:

1. My name is Philip Hill and I am the brother of Darrel Hill, Jeffrey Landrigan's biological father. Presently, I reside in Jennings, Oklahoma.

2. When I grew up my family lived between Tulsa and Sand Springs, on the Sand Springs line. My parents were William Leonard Hill and Alta Marie Baker Hill.

3. My father abandoned our family when I was very young and my mom raised us on her own. She tried to work as a waitress but with five children she could not make ends meet. She received a welfare check and we children would mow lawns and do other odd jobs to earn money to help out. It was a rough existence and we were very poor. We grew a garden and raised chickens and rabbits for food.

4. My father, William Leonard Hill, abandoned our family when I was very young. He died in 1961, when I was fifteen years old. My father was a thief who was shot and killed by the police. My mother has told me that he worked as a cement finisher until he injured his back and turned to alcohol. I was around two or three years old when he became an alcoholic.

5. I last saw my father the day before he was shot and killed. He walked into our house one day and I could see that he had been drinking. He said that he was there because he wanted to see his kids. I told him that I did not see it as his privilege after all those years

[redacted] /s/PGH]. My father then left the house. My mother was not home when this incident took place.

6. My mother gave three children up for adoption that I am aware of. In approximately [redacted] [(?) /s/PGH] she gave birth to twins. She gave them up for adoption and I do not remember them at all. I was only a few years old at the time and do not know the family history on this. I also have a sister, Debbie, who was given up for adoption. I was six or seven years old when my mother gave birth to her.

7. Later Richard Hill married my mother, Marie Hill. At the time Richard Hill, alone, was raising his young children after his wife died. Richard turned his children loose when they got older and as a result, his daughter Virginia, and her siblings, were wild.

8. The marriage did not last long though. My mother was the dominating type and Richard Hill was a wimp.

9. After my mother and Richard Hill divorced, I don't think that my mother ever legally remarried. She did, however, move to Arkansas in the 1960's and there she lived with a man named L.H. Clark. I think that Mr. Clark died from cancer but I never really knew him.

10. My two older brothers, Billy Wildren Hill and Darrel Wayne Hill, spent more time with my father because they were older. When I was three years old, Bill was already twelve. I have always thought that this was the reason that Bill and Darrel were the ones who got into trouble. These two brothers stayed in trouble. Every time I turned around, one of my brothers was in the newspaper. This was hard on me and the rest of the family.

11. My brothers Bill and Darrel are both completely institutionalized. Bill has been in prison all of his life. For the last 35 or 40 years, Bill has only been out of custody for a total of three or four years. It is the same story with Darrell. He was locked up from the time I was seven years old until I was fifteen. During the 1970's I tried to help both brothers when they got out of prison. I gave them jobs, cars, etc. It did not work though because they were so institutionalized. In fact, the last time I saw Darrel, he stuck a pistol in my face. This was two days before he shot and killed a man in Arkansas. Darrel was using dope at that time.

12. I have an older brother, Dennis Hill, who lives in Oklahoma. Dennis is an alcoholic. He no longer drinks. He got married and got religion. I haven't seen him in several ~~years~~ [months /s/PGH] and have no contact with him.

13. My brothers Darrel and Bill are also alcoholics. They can never have just one beer. I have been in bars with all of them and when I would leave to go home they would still be at the bar drinking.

14. Having two of my older brothers constantly in trouble with the law was very hard on my mother. The police would come in and shake our house down in the middle of the night looking for Bill or Darrel. All of us children have gone our separate ways since we've grown up.

15. To the best of my recollection, my brother Darrel and my step-sister Virginia were together during the late 1950's and the early 1960's. I would not be at all surprised if Virginia used drugs and alcohol because she was with Darrel and I know he did.

16. I was never contacted by attorneys or investigators appointed to represent my nephew at trial, on appeal, or in post-conviction proceedings. Had any attorney or investigator contacted me, I would have disclosed the information stated in this declaration, ~~as well as other information. I also would have been willing to testify on my nephew's behalf in any proceeding.~~ [/s/PGH]

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 1 day of October, 1998.

/s/ Phillip G. Hill
Philip Hill

Declaration by Josephine Snyder

I, Josephine Snyder declare under penalty of perjury the following to be true to the best of my information and belief:

1. My name is Josephine Snyder and presently I reside in Tulsa, Oklahoma. I have been friends with Marie Hill for over forty years.

2. When Marie's son, Darrel, was a boy, he would come over to my house and stay the night. He would stay over at my house on the weekends – Friday and Saturday nights. If my family and I went someplace on Sunday, Darrel almost always was allowed to go with us.

3. My husband had two sons of our own but we were very fond of Darrel as well. In fact, we wanted to permanently adopt Darrel and make him part of our family. [JS] Darrel's father, however, would not allow us to adopt his son.

4. Some years later, Marie became pregnant agin. The father of this unborn child was my uncle, Aaron Fain. Before the baby was born, Marie told me that she was going to give this baby up for adoption. I told Marie that if the baby was a girl that I would like to have the baby. We did not discuss this issue again but I assumed that we would talk about it again if it was going to happen.

5. One day I received a telephone call from Marie Hill. She was calling me from the hospital and had had her baby. Marie asked me, "Remember what you said? Well, if you want her come and get her. If you don't want her I'll just leave her here because I'm leaving." I asked Marie to give me enough time to get over to the hospital. I had to go out and buy clothes for the baby because her call was

unexpected. I was allowed to adopt Debbie because I was related to her.

6. I have had my daughter, Debbie, ever since she was two days old. My husband and I went through the courts and legally adopted Debbie. From the time that Marie called me to come and get the baby, she never expressed any interest in Debbie again.

7. Darrel's father was still alive when Marie gave birth to Debbie. Mr. Hill was shot dead by the police during the commission of a robbery with his son Darrel.

8. I was never contacted by attorneys or investigators appointed to represent Jeff Landrigan at trial, on direct appeal, or in post-conviction proceedings. Had any attorney or investigator contacted me, I would have disclosed the information stated in this declaration, as well as other information. I also would have been willing to testify on Jeff's behalf at any proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 11-13-98 day of November, 1998.

/s/ Josephine Snyder
Josephine Snyder

Declaration by Darrel Hill

I, Darrel Hill declare under penalty of perjury, that the following to be true to the best of my information and belief:

1. My name is Darrel Hill and I am the biological father of Jeffrey Landrigan, formerly known as Billy Patrick Wayne Hill. Presently, I reside in Tucker, Arkansas where I am on death row.

2. I was married to Jeff's mother, Virginia Gipson (f.k.a. Letha Virginia Hill), in 1959. During the time that we were together, I abused drugs and alcohol. I used a drug called Valo, an over-the-counter nasal inhaler. Inside of the inhaler was a greasy cotton material. I would stick a needle directly into the cotton ball and then inject myself with the greasy substance. I used Valo four or five times a day. I had strong hallucinations when I used Valo. I also used Seconal, Nembutal, cocaine, heroin and anything else that was available to me. In addition to this, I drank moonshine that was about 80% pure.

3. During the time that Virginia and I were together, she abused drugs, particularly amphetamines. She used drugs before, during, and after her pregnancy. She used whatever drugs were available to her. Virginia also drank alcohol. I do not know if Virginia drank when she was pregnant with Jeff.

4. My father was Bill Hill. He was shot and killed by a police officer while attempting to flee the scene of a robbery/burglary that he and I committed. My father and I were not the only ones in our family to commit crimes. Excluding Jeff, there have been four generations of Hill men who were outlaws.

5. Virginia's father, Richard Hill, married my mother, Marie Hill, before Virginia and I were married.

6. While Virginia was in the delivery room in labor with Jeff, I was in the waiting room with my mother, Marie Hill. I went into the bathroom every hour and injected Valo while we waited for Jeff to be born.

7. After Jeff was born, we lived with my mother for a while. Her next door neighbor was a man named Tommy Owens.

8. The last time that I saw Jeff he was approximately six months old. I was in prison serving 14 months for burglary. Virginia brought Jeff to visit me and that was the last time I saw him. When I was released from prison I learned from my mother that Virginia had moved and that Jeff had been given up for adoption. It took me a few months to locate Virginia. I was very angry with her for giving our son away because I felt that she had taken the only thing that had ever been mine. I was so angry with her.

9. Jeff made contact with me after he met Tommy Owens in prison in Oklahoma. Jeff told me that Tommy walked up to him and told him that he (Jeff) must be Darrel and Virginia Hill's son because he looked just like Darrel. From that point on, Jeff and I have corresponded by letter.

10. I spoke to Jeff's adoptive mother, Dot Landrigan, several times by telephone. She was always drunk when we spoke.

11. I was never interviewed by attorneys or investigators appointed to represent my son at trial, on appeal or in post-conviction proceedings. Had any attorney or

investigator contacted me, I would have disclosed the information stated in this declaration, as well as other information. I also would have been willing to testify.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 10-16-97 day of October, 1997.

/s/ Darrel Hill SK877
Darrel Hill

Declaration by Shannon Sumter

I, Shannon Sumter declare under penalty of perjury, that the following to be true to the best of my information and belief:

1. My name is Shannon Sumter and I am the adoptive sister of Jeffrey Landrigan. Presently, I reside in Tulsa, Oklahoma.

2. My father was Edward Victor "Nick" Landrigan. He grew up in a large, Catholic family in Lockport, New York. His father, Edward Landrigan, Sr., was a blue collar worker. Edward Sr.'s wife, Lillian, was a homemaker. My father was raised with good Irish discipline by his father. This discipline would be considered child abuse by today's standards. I think my father was bitter regarding his strict upbringing and as a result made sure not to treat his own children in that manner. He left his family, entered the military and attended college on the G.I. bill. He met my mother at the University of Texas at Austin, where they were both students. We only went to visit my dad's family in Lockport two or three times.

3. My mother, Dorothy Fae "Dot" Landrigan (nee Jeffrey), was from Texas. In contrast to my father, she came from a devout Baptist family. Her father, Jess, worked blue collar odd jobs but was a heavy smoker and became sick to the point that he could not work. Her mother, Mabel, was a talented seamstress. She was the main breadwinner in the family after Jess became ill. My mother was from a small family. Her only sister, Mary Kathryn, died when she was three years old from meningitis.

4. My mother earned a degree in journalism and worked for a newspaper in Austin briefly. My father

earned a degree in geology. My parents married in 1947 or 1948. My mom quit working after I was born in 1952. My father got a job with ~~City~~ [Cities /s/ SS] Service and transferred to Bartlesville in 1953.

5. I was the only child born to Dot and Nick. When I was seven or eight years old I recall that my parents started the application process to adopt a baby.

6. I was ten years old when our family adopted Jeff. I remember that I came home from school one day and both of my parents were home waiting for me. They told me that I needed to get some things together because we were going to Oklahoma City for the night. My parents told me that I was getting a new brother. The next morning, my parents met with a social worker in Oklahoma City, signed some papers, and we left with Jeff who was eleven months old at the time. My parents were entirely unprepared to take a baby home – they had not even had time to go and buy diapers or any other supplies.

7. When Jeff first came to my parents as a baby it was somewhat of a disruption to the family. They had not had a baby in their home for a long time and Jeff was very different as a baby than I had been. My mother told me that I had been an obedient child whereas Jeff was not.

8. When Jeff was a baby, he had trouble sleeping through the night and did not do so for quite some time. He was fearful of the dark and would crawl out of his crib as soon as he was old enough to do so. Jeff would crawl down the hall dragging his laundry basket full of toys. Then he would crawl under our parents' bed and go to sleep. In the morning when I got up I would see part of his head sticking out from underneath the dust ruffle. He

sometimes slept under my bed as well. This was a ritual that continued until Jeff was approximately six years old.

9. Jeff was not more connected to any one person in our home when he was growing up. I do not recall Jeff ever having a dislike of anyone. He was reserved around strangers. He was not overly friendly nor was he overly clingy with them.

10. Even at a very young age, Jeff had a temper and would throw temper tantrums. My parents were taken aback by this because I was not like that as a child. If Jeff was mad at you, he would throw something at you. If you slammed the door shut on him, he'd stand there and kick the door. Jeff and I sometimes would get into fights. I remember once when he was between the ages of 8 and 10 and he was angry with me. He picked up a little statue and threw it at me. I went into my room and locked the door and he stood outside of my door screaming.

11. Although Jeff had a bad temper, he was not particularly argumentative. However, if you asked him to do something and then went to check on him, he frequently got sidetracked and hadn't done whatever it was that you had asked him to do.

12. I don't think my parents ever sat down with Jeff and told him he was adopted though. [they never hid the fact either /s/ SS] One day when Jeff was still in elementary school he came home crying because a boy told him that he couldn't play with them because he was adopted. My mom found a book for Jeff that told a story on a child's level that explained what it meant to be adopted.

13. I often wonder if Jeff suffered from fetal alcohol syndrome. I think that Jeff had some of the physical traits associated with FAS.

14. Jeff would start activities but then lose interest in them. He participated in the Indian Guides which was like the Boy Scouts and was sponsored by the YMCA. He also played T-ball, bowled and took karate lessons. But he would get to the point where he would say he no longer wanted to participate in the activity anymore so don't bother to take him. Whatever he expressed an interest in, my parents would let him try it. If it was too much hard work though, Jeff would quit. He got bored easily.

15. Jeff started skipping school and doing drugs when he was pretty young. He and I were very different from one another.

16. Jeff was around twelve years old when he really started acting out. I think that his behavior was exaggerated by his drug use. It took both my mother and father to manage Jeff's behavior, especially when he reached adolescence. My mother could still function at that time and was still working, but her drinking was progressive. It got to the point a few years later where I did not want to leave my daughter, Sheridan, alone with my mother because of her alcoholism.

17. Jeff and my mother seemed to suffer from greater discord when my father was out of town on business. I recall an incident when my mother hit Jeff with a frying pan hard enough to leave a dent. My daughter witnessed Jeff push his mother up against a table and slap her across the face.

18. My mother was an alcoholic. Her alcoholism became worse over the years. When I still lived at home, my mom had to have a couple of drinks when she got home from work before she would make dinner. After I left for college though, my mom started drinking in the morning before she went to work. I don't know if Jeff 3 behavior exacerbated her drinking problem or if her drinking problem exacerbated Jeff's behavior. Eventually they made her retire from work and she earned disability for three or four years, which gave her more time at home to drink. My mom had problems walking that were caused by her drinking – her balance was affected. Also, her liver showed signs of damage.

19. When my mother was drinking she would repeat herself and was very irritating. She was not a quiet drunk. She would drink until she passed out. She got to the point where all she drank was vodka. She consumed a fifth a day or more. My father was an enabler and would buy her vodka for her. At one point she became very jaundiced and was the color of a pumpkin. This was about a year before her stroke, in 1989.

20. After my mom's stroke, the doctors performed a liver scan and found that only 20 to 25% of her liver was functioning.

21. When I was disciplined by my parents it was done verbally. I can count on one hand the number of times that I was ever spanked by my parents. My father was tolerant to a fault. He was raised in a harsh environment and didn't want to take it out on his kids. When my dad disciplined me, all he had to do was look at me and say, "Now Shannon. . . ." If I felt any disapproval from my father, that was enough for me. With Jeff though, Dad had

to be both sterner and louder. Then Jeff sometimes paid attention to him, sometimes not. Jeff got spanked a lot as a result of this. My parents tried a lot of different tactics with him. They withheld privileges and rewards from him, but he did not learn.

22. My father was stoic and kept his emotions to himself. My mother was very expressive and was the yeller of the family. She pretty much ran the show at home. My father and I learned to just go along with Mom because it was easier that way. Jeff never learned to do that. He did not ever learn from experience.

23. When Jeff was 10 or 12 years old, he decided that he was too old for a babysitter anymore and was allowed to stay home alone after school from that point on. There were boys in the neighborhood that Jeff was close with and they were all left largely to their own devices after school. It was around that time that Jeff hit puberty and they all started getting into trouble together. They broke into a house together and stole some things when Jeff was about fourteen years old and there were also some vandalism complaints about Jeff.

24. When Jeff was in junior high, about 12 or 13 years old, my parents sent him to a camp for troubled boys. Jeff had begun to get into enough trouble around this time to get the police involved. Starting around this time, it was my family's weekend routine to go and visit Jeff wherever he was in custody.

25. When Jeff was twelve or thirteen he was breaking some household rules. For example, he wasn't doing his homework and started skipping school. During this same period of time my dad had to travel on business trips. My mom would call him wherever he was on his trip

because she could not get Jeff up in the morning to go to school. My mom would get hysterical and my dad would try and talk to Jeff on the phone. My dad finally told his boss that he couldn't travel anymore because of problems at home.

26. Growing up, Jeff would do just about anything in order to avoid going to school. Although my mother would drive him to school and watch him walk in the front door of the building, Jeff would then walk back out the door once she drove off. Jeff's grades in school were horrible and he had no interest in anything. He quit sports and there were no classes that he liked.

27. When my daughter, Sheridan, was five or six years old Jeff took over the basement in my parents' home. He originally had his bedroom upstairs but then took the room that my parents used as a ~~living~~ [family /s/ SS] room. It was like Jeff had his own apartment – it had a private entry so Jeff could come and go as he pleased. Unfortunately, all of his friends could come and go as they pleased as well. He would drink and use drugs in his basement apartment. Jeff trashed the basement. Up until the time that Jeff took over the basement, our family used to celebrate Christmas in that room.

28. When Jeff turned sixteen, my parents bought him a car. He promptly wrecked it and they bought him a new one. Then they had him switch cars with me because my car was older. Jeff then wrecked my car. Jeff wrecked at least five or six cars. The wrecks were high speed and involved alcohol.

29. Around the time that Jeff was sixteen, he had a drinking contest with his friends to see who could drink the most. When my family could not wake Jeff up, they

called an ambulance for him. Jeff and his friends drank on weekends and maybe were using drugs as well. I think that this is what contributed to the beginning of the vandalism as well. Alcohol was always available in our home because of my mom but she never mentioned Jeff getting into her liquor.

30. Jeff married his wife, Sandy, in 1981. She was pregnant when they got married. Although Jeff had brief periods of employment during this time, he and Sandy both had the attitude that my parents could support them. My parents perpetuated some of this, like they did when they continued to buy him cars. My parents kept Jeff and Sandy afloat.

31. Jeff didn't care about anyone except maybe himself. He is very self-centered. He would start things but never follow through and finish them. He was already heading this direction before he met Sandy but this behavior became more pronounced with her.

32. There were many times that Jeff was close to death. I am referring to drug overdoses, alcohol abuse, and automobile accidents. Also, in the incident that resulted in Jeff being convicted of murder in Oklahoma, Jeff could have easily been killed by his best friend, Greg. Greg was much bigger than Jeff.

33. My parents were a lot more tolerant of Jeff than if I had done all of these things. Jeff did not seem to get it that there are rules to play by. He never apologized for anything or took responsibility for his actions.

34. During one of their many trips to visit Jeff wherever he was in custody, my parents drove several hours to see Jeff and took him a hamburger. Jeff came out

for the visit, took the hamburger, and then left because there was a ball game on television that he wanted to watch. This was the last time that my mother ever visited Jeff.

35. My mother and Jeff's biological father, Darrel, corresponded after Jeff found out who his birth parents were. Darrel offered my mother some comfort and gave her additional information about Jeff's background.

36. My parents took all of the responsibility for Jeff's behavior. I now realize that it probably didn't matter who raised Jeff; he was going to have problems.

37. Jeff's biological daughter is just like Jeff. She doesn't do her schoolwork and was kicked out of school. Jeff's daughter is currently in a behavioral treatment facility. I think that Sandy drank alcohol and used drugs when she was pregnant with their daughter. Sandy would abandon their daughter at my parents' house for days at a time. Jeff's daughter is just like Jeff.

38. Jeff and I never had a very close relationship. He was very impulsive and has trouble with attachment. We no longer ~~write~~ [talk /s/ SS] to each other but he does ~~call~~ [write /s/ SS] when he needs something. I take care of sending Christmas gifts to his daughter for him. My relationship with Jeff is for the most part terminated. Some of this is self-preservation and protection. In spite of this, Jeff is still my brother and I do not want him to be executed.

39. I was never contacted by attorneys or investigators appointed to represent my brother at trial, [or /s/ SS] on appeal, ~~or in post-conviction proceedings~~ [omit /s/ SS]. Had any attorney or investigator contacted me, I would

have disclosed the information stated in this declaration, as well as other information. I also would have been willing to testify on Jeff's behalf at any proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 26 day of October, 1998.

/s/ Shannon Sumter (SS)
Shannon Sumter

Declaration of Shannon Sumter

I, Shannon Sumter declare under penalty of perjury, the following to be true to the best of my information and belief:

1. My name is Shannon Sumter and I am the adoptive sister of Jeffrey Landrigan. Presently, I reside in Tulsa, Oklahoma.

2. My mother was Dorothy "Dot" Landrigan. My mother worked for a newspaper in Austin but quit working after her pregnancy. She did not go back to work until I was in high school. When my mother returned to work, she worked in the medical records department of the local hospital in Bartlesville. She worked the 3:00 p.m. to 11:00 p.m. shift. Working a later shift ensured that either my father, Nick, or I would be home in time to take care of Jeff. Eventually, our family made arrangements to have Jeff go to a babysitter after school. Each day after school, Jeff went to stay with a family that lived near us. This routine lasted until Jeff was ten or twelve years old. That was when Jeff decided that he was too old for a babysitter anymore and was allowed to stay home alone from then on.

3. My mother left her job at the hospital to work for Phillips Petroleum. She worked for Phillips in Bartlesville until she retired.

4. Although she did not continue to work for a newspaper, my mother maintained a lifelong interest in journalism. She helped me with my homework, especially writing and English.

5.a. My mother loved to entertain and have parties. She was active in anything I expressed interest in. For example, she was the scout leader for my Girl Scout troop.

5.b. My father, Nick, began working for the Bartlesville, Oklahoma office of Cities Service in 1953. He was their chief log analyst~~/logging engineer~~. [geologist /s/ SS] He worked for the Bartlesville office until his transfer to the Cities Service Tulsa office. From that time on, he commuted the sixty miles to Tulsa every day. He drove in a van with several other co-workers.

6. Although our parents were supportive and provided well for us, ours was not a very affectionate or demonstrative family.

7. When Jeff was seven or eight years old, the man who ran the local bowling alley befriended Jeff. Jeff and he spent a lot of time together. The man became sick and died from cancer. When he passed away, Jeff lost a father figure.

8. Also when Jeff was about eight years old, he and his friend Mindy decided to run away from home. I do not know why they did this. They took their little red wagon and crossed heavy traffic to get to the local shopping center.

9. The first custodial placement that Jeff went into may have been initiated by my parents and not the courts. I know that they sent him to a camp for troubled boys when he was in junior high.

10. In 1970 I left Bartlesville to begin college. I attended Oklahoma University for one year. After that, I married Tim Rigsby and we had a daughter, Sheridan. When Tim

and I got a divorce, he cleaned out our joint checking account and I had to borrow money from my parents.

11. I returned to college and became a registered nurse. For some time, I worked at a job that required me to work weekends. As a single mother, I left my daughter in the care of my parents on the weekends when I had to work. In 1979 I got a job that gave me weekends off. This came as a relief to my daughter because she no longer had to spend weekends with my parents and Jeff. By this time my daughter was eight years old and Jeff's behavior was out of control.

12. Jeff moved out to Texas for a while to live with our maternal grandmother. He got into trouble in Texas though and this started to take a toll on our elderly grandmother's health. For this reason, Dot and Nick moved Jeff back to Bartlesville.

13. In 1982, Sandy and Jeff were expecting the birth of their child. That same year, I married Steve Sumter.

14. I was never contacted by attorneys or investigators appointed to represent my brother at trial or on appeal. Had any attorney or investigator contacted me, I would have disclosed the information stated in this declaration, as well as other information. I also would have been willing to testify on Jeff's behalf at any other proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 13 day of November, 1998.

/s/ Shannon Sumter (SS)
Shannon Sumter

Declaration by Robert Forrest

I, Robert Forrest declare under penalty of perjury, the following to be true to the best of my information and belief:

1. My name is Robert Forrest and my family lived in the same neighborhood as the Landrigans. I was friends with Jeff Landrigan and we attended the same schools. Presently, I reside in Bartlesville, Oklahoma.

2. We moved in next door to the Landrigans when I was approximately ten years old. My brother, Dale, and I were approached by Jeff and his friend, Arthur Athens, who was known as Klingman. They said that as the new kids in the neighborhood, we had to "whip them." We all rolled down a little hill wrestling and my brother and I just figured that was how it was living in the city. We had previously lived on farms. We all became friends little by little and remained friends until junior high. We took martial [Judo /s/ RF] arts together, but Jeff did not stick with it.

3. Jeff was raised with "no discipline." Jeff's father, Nick, was always quiet. Jeff's mother, Dot, drank about a gallon [? I can't be sure of that? /s/ RF] of whiskey a day. Dot was usually a peaceful drunk though. Dot was an alcoholic. As long as she had her whiskey, she was fairly passive unless you crossed her. If you did cross her, she got angry. This would usually happen right before she passed out. Dot was drunk every night. [? I can't make that statement. /s/ RF]

4. Jeff always got his way. My brother and I did as well, but Jeff's family had the financial means to fulfill his wishes and ours didn't. Jeff's dad took us to the bowling alley, the swimming pool, the roller rink, etc. We also had sleep overs at each other's houses that. ~~Nick organized~~

[/s/ R.F.] Looking back, Nick probably thought that it was best if everyone was away from Dot when she was drinking, himself included. I always thought that Jeff probably got tired of seeing Dot stewed all of the time.

5. We all tried cigarettes but Jeff was the one that stuck with it. My brother and I got into sports whereas Jeff got into long hair and rebellion.

6. It wasn't until we were in junior high that we really got introduced to drugs. In junior high I recall mostly marijuana and cigarettes but then pills in high school. Cocaine and crystal came later, around 1978. There was a lot of peer pressure to use the drugs. Jeff got into marijuana by seventh grade. In high school he was heavily into crystal and meth. I did it myself as well. It made me hallucinate and do stupid things, including staying up for days on end. Back then, everybody's heads was unscrewed due to drug use.

7. When we were around eleven or twelve years old, Jeff told me that he was adopted. He seemed upset when he told me and I had the impression that he wanted to talk to his dad.

8. Dot and Nick gave and gave to Jeff but they gave him the wrong things. They gave him material things but I did not see them giving [many /s/ RF] hugs or kisses. They were warm in that I did not see them fight but they were not a warm family: Dot was a drunk and Nick was quiet.

9. When we were using drugs, we experienced behavior changes. We were all like that but I could tell that Jeff was angry. We were all stewed and stupid – menaces to society.

10. I was never contacted by attorneys or investigators [probably because I would have been a hostile witness

/s/ RF] appointed to represent Jeff Landrigan at trial, on appeal, or in post-conviction proceedings. Had any attorney or investigator contacted me, I would have disclosed the information stated in this declaration, as well as other information. ~~I also would have been willing to testify on his behalf at any proceeding.~~ [?I would have testified to this declaration but would not testified on Jeff's behalf so as to try to clear his wrong actions /s/ RF]

I declare under penalty of perjury that the foregoing is true and correct.

Dated this Nov. 4 day of October, 1998.

/s/ Robert J Forrest
Robert Forrest

STATE OF OKLAHOMA

DEPARTMENT OF PUBLIC WELFARE

Mr. L.E. Rader, Director
Dept. of Public Welfare

Date: May 6, 1963

Deborah Rothe
Dist. C.W. Supervisor

Attention: Mrs. Mary Rush

LANDRIGAN, E.V.
Trial Adoption
Washington County

Enclosed please find the medical report on Jeffrey Landrigan. The Landrigans are most anxious to complete this adoption as they are planning an extensive vacation this summer and will be out of the state. Would you please send the legal papers to Mr. Lloyd Rowland, Attorney, Price Tower, Bartlesville, Oklahoma.

/s/ D. Rothe

DR:as

Beulah Phillips
Intake Worker
Tulsa Unit
11-21-62

Hill, Billy
CW-13194
Tulsa County

IDENTIFYING INFORMATION: Social Service Exchange lists pending ADC application dated 7-16-62; TCW #2795-C, 10-13-61; DPW-D, 1-24-62. Virginia Hill's husband was listed as Deryl Wayne Hill. The paternal grandparents are listed as William and Alta Hill, who have the following: JCO#3376 dated 3-56; ADC #107127 dated 1-20-51 and another JCO from 1952.

Beth Clay of Family Services Division was contacted, who said she had an application for Virginia Hill on the behalf of her son, Billy Hill, whose birthdate was listed as 3-17-62. Virginia Hill's birthdate was 9-3-44. The application was taken 7-16-62 and cancelled 11-13-62 when she was unable to locate Mrs. Hill. The address listed at the time of application was 641 N. Cheyenne, apt. #9.

[11/8/62]

Mrs. Hess of Barnard Nursery telephoned to report a baby known to them as Billy Hill was placed in the nursery for one day approximately three weeks ago from this date and the manager of the nursery, Mrs. Hess, had tried several times to get in touch with the child's mother at the Bliss Hotel, which was the address given at the time the baby was left at the nursery. Every time the room at the hotel is contacted a girl answers the phone, pretending to know nothing of the whereabouts of Mrs. Hill. The person gave first one excuse after another for not coming to see the child and then finally said Mrs. Hill was sick in a hospital in Oklahoma City. When contacted again on the telephone, the girl remarked that she had no way of caring for the baby. Mrs. Hess was referred to Juvenile Court and Rhea Folger, Counselor for Juvenile Court, had the baby picked up and placed in the Emergency Shelter on this same date.

Mrs. Folger, Counselor for the Juvenile Court, contacted Mrs. Page, manager of the Bliss Hotel, who said three girls had been renting a room at the hotel and had slipped out a few days after being contacted by the Barnard Nursery manager and they had not paid their hotel rent. The girl who is supposed to be the mother of the child was listed in the hotel books as Virginia Hill. She is a small, blonde girl about 5 feet, two inches tall, weighing

approximately 95 to 100 pounds. The second girl called herself Mrs. Jim Dalton, Virginia's sister. She has dark hair and is a tall girl. The third girl was signed in as Annetta Maybee and this girl was pregnant. It was understood by Mrs. Folger that the negro porter of the hotel had been in touch with the girls and could possibly furnish more information as to the girls' whereabouts. However, he had been very reluctant to give any information and was evasive in answering questions. He did say that the girls had gone to Room 302 at the Reeder Hotel to visit a friend who was living there at the time. The last he had heard of any of the three girls was that one of them said she worked at the Mobile Club on South Peoria.

Worker contacted Beth Clay, Caseworker for Family Services Division, who said at the time of Mrs. Hill's application for Aid to Dependent Children, she was reported to be living with her sister, Ginger Reynolds, at 641 N. Cheyenne. Her sister, at the time, worked for the Elite Club, however does have an application pending at Borden's Cafeteria. Mrs. Hill's husband was listed as Deryl Wayne Hill who is now in McAlester State Penitentiary, Penn #67119. Billy Hill was the only dependent she had listed on her application and it was not stated in the intake whether or not Mrs. Hill was pregnant again, however it was stated that

Beulah Phillips
Intake Worker
Tulsa Unit
11-21-62

Hill, Billy
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Tulsa County

Annetta Maybee, who was with Mrs. Virginia Hill at the time of the application, is separated from her husband

whose name was Roy Compton Maybee and Mrs. Maybee was very definitely pregnant. Mr. Hill's parents are listed as William and Alta Hill, who are now residing in Locust Grove.

[11/16/62]

Juvenile Court face sheet, narrative and legals received by this office.

[11/19/62]

On this date Billy Hill was moved from the Emergency Shelter to the boarding home of Mrs. Lonnie Geren, at 306 West Knoxville, Broken Arrow, Oklahoma.

[11/21/62]

An emergency clothing order forwarded to the State Office.

Worker talked with Mr. Larry Myers, Counselor for Juvenile Court, and this case has not been set on the Court docket, however he will keep the worker informed.

ACTION TAKEN: This is being accepted as an active Child Welfare case with Billy Hill being cared for in a foster home.

/s/ [Illegible]
BP:hm

Harold W. Arrowood
Caseworker
Tulsa Unit
12-7-62

Hill, Billy
CW-13194
Tulsa County

[11/29/62]

A visit was made to the Geren foster home at 307 West Knoxville, Broken Arrow, Oklahoma. Mrs. Geren related

that Billy Hill was ill. Ever since he has been in her home he has had trouble breathing and he has a "rattle" in his chest. She felt that the child might have asthma. He frequently cries in the night and has trouble getting his breath. She has to sit up with him.

The child was taken on this date to Dr. Kramer for an examination. Billy is 27 inches tall and weighs 18 pounds, 14 ounces. Dr. Kramer diagnosed his illness as bronchitis and he was given an injection of bicillin. He was also given a TB patch test, a blood test and a urine specimen was taken. Dr. Kramer requested that the child return in one week.

[12/5/62]

On this date the clothing which had arrived from the State Office was taken to the Geren foster home for Billy Hill. Mrs. Geren reported that the child's health was much improved. She stated that he is now eating solid foods and was doing much better. She felt that his breathing is also improved and he is now sleeping all night without awakening.

The child was returned to Dr. Kramer's office on this date for further examination and treatment. Dr. Kramer stated that the urinalysis on the child checked out okay, and that the blood test revealed an iron deficiency and a susceptibility to allergies. Upon examination, Dr. Kramer felt that the child's bronchitis was much improved and that further examination and medication was not needed at this time. An examination of the child's eyes revealed no trouble. Billy was given an oral Polio vaccination and a 3-in-1 shot. Dr. Kramer prescribed medication for the child's iron deficiency and asked that he return on Friday, January 4, 1962.

The medication prescribed was purchased at Prather's Prescription Shop and the boy's shoes were purchased at Sear's.

Mrs. Geren, foster mother, was advised concerning the administering of the ferrisol drops prescribed by Dr. Kramer for the child and was asked to contact this worker if Billy's breathing did not continue to improve. The child seems to be very happy in the foster home. He laughs a great deal and is very active and playful. Both Mr. and Mrs. Geren appear quite fond of ~~the~~ Billy and are very proud of the improvement he has made since he has been in their care.

/s/ [Illegible]
HWA:hm

[/s/ JL]

Harold W. Arrowood
Caseworker
Tulsa Unit
12-26-62

Hill, Billy
CW-13194
Tulsa County

[12/7/62]

A telephone call was received from Mr. Bob Talbutt, Probation Supervisor of the Tulsa County Juvenile Court. Mr. Talbutt related that Mrs. Alta Marie Clark, paternal grandmother of Billy Hill, is in his office, asking about the child. Mrs. Clark states that she does not know the whereabouts of the child's mother. We took down her home address (5432 West 8th) and asked Mr. Talbutt to advise her that we would visit her in her home on Monday.

[12/10/62]

A visit was made to the Clark residence at 5432 West 8th Street and no one was at home.

A telephone call was received from Mr. Larry Myers, Juvenile Court Counselor. He stated that Mrs. Clark and Mrs. Virginia Hill had been in his office today. Mrs. Hill came to Mrs. Clark's residence on 12-8-62. Mr. Myers advised them to contact this worker for an appointment.

[12/11/62]

Mrs. Virginia Hill telephoned the office today, asking for an appointment to talk with this worker. We advised her that she could come to the office at 10 a.m. on 12-13-62.

[12/13/62]

Mrs. Virginia Hill was seen in the office today. She came in with her hand pressed against her side and stated she had been very ill all night with a side ache but that she didn't like to go to doctors because she was afraid of shots. We questioned her regarding this and learned that she has been having severe pains for quite some time. It was suggested to her that it would be in her best interest to seek medical attention immediately to [illegible] her illness from becoming more serious.

Mrs. Hill states that she placed Billy in the Bernard Nursery temporarily while she sought employment. During this time she had no permanent address but was staying nights here and there with "girlfriends". She found a job with a "magazine crew", which required traveling around so she left the child in the nursery. Then she became ill and was unable to come and pick the baby up. She says that she had her sister, Jean Reynolds, to contact

the nursery and learned that Billy had been "given to the Welfare". At this time, she became afraid that she would be charged with child abandonment so she hitchhiked to the home of her paternal grandmother, Mrs. Betsy Childress, near Okemah, Ok. Mrs. Hill is not sure of the dates of any of the above occurences.

Harold W. Arrowood
Caseworker
Tulsa Unit
12-7-62

Hill, Billy
CW-13194
Tulsa County

On 12-7-62 Mr. and Mrs. Childress brought Virginia Hill to Sand Springs, Okla. and the home of her maternal grandmother, Mrs. Irma Hill, 506 W. 1st, Sand Springs. On 12-8-62 she went to the home of her mother-in-law, Mrs. Clark, and she is presently living there. Mrs. Hill would like to have her baby returned to her custody and she plans to live with her mother-in-law until she can get a job and "get on her feet". She states that she is not pregnant at this time.

The following people are presently living in the five-room Clark home at 5432 West 8th: Mr. and Mrs. Leo H. Clark, married 1-8-62; three of Mrs. Clark's children, Dennis Hill, age 20 years; Phillip Hill, age 16 years; Carolyn Sue Hill, age 13 years; and Mrs. Virginia Hill, daughter-in-law. Mr. Clark does building construction work and Mrs. Clark is a housewife. The two Hill boys are employed and the girl, Carolyn Sue, is in school.

Mrs. Hill states that her in-laws are very nice to her and that they want her and her baby to live with them. They are aware of her intent to divorce Deryl Wayne Hill.

We explained the purposes of the Tulsa County Child Welfare Unit to this woman and told her that we were interested in working out the best plan for Billy. We also informed her that we intended to check into her background and her present home environment during the course of our study.

Mrs. Hill asked if she could visit her child. We called Juvenile Court and got the permission from Judge Young for an office visit. Mrs. Hill was advised we would bring Billy to the office tomorrow, 12-14-62, at 9:30 a.m. for a short visit.

BACKGROUND INFORMATION: Mrs. Virginia Hill (maiden name Hill also) gave the following background information. She was born 9-3-44 in Tulsa, Okla. Her mother died when she was very young and she spent her childhood in the Sand Springs Orphans' Home. She began writing to Deryl Wayne Hill, born 9-11-40, while he was in the prison at McAlester at his mother's request. He was released from prison and they were married on 2-18-61 in Miami, Oklahoma. At this time, Mrs. Hill quit school in the 11th grade. Mrs. Hill relates that after three months of married life her husband began drinking and stealing again and that he never worked or supported her or the baby. At this time she plans to file for a divorce.

[12/14/62]

Billy Hill was picked up at the Geren foster home, and brought to the office, where he visited with his mother, Mrs. Virginia Hill, and his paternal grandmother, Mrs. Clark. The relatives displayed a great deal of affection for the child.

[12/17/62]

Mrs. Virginia Hill came into the office today while this worker was out of the office. She did not leave any message.

[12/18/62]

A telephone call was placed to Dr. Rupp's office, Mrs. Hill's family physician, to learn if Mrs. Hill had been into their office recently. We learned that Mrs. Hill had been placed in Hillcrest Hospital yesterday evening with severe abdominal pains. The nurse at Dr. Rupp's office said that she believes Mrs. Hill was admitted as a county patient and that Dr. Rupp will not be giving care.

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[12/27/62]

On this date we visited the Clark residence and talked with Mrs. Virginia Hill. She states that she stayed at Hillcrest Hospital for four (4) days and that her bill was to be paid by the Crippled Children's Unit. Her doctors were Dr. Byron Steele and Dr. Mann. Mrs. Hill states that her physical condition improved a great deal during the time she was hospitalized and that she continues to improve at this time. She did not receive the diagnosis from the doctor but she believes that her abdominal pains were caused by inflammation of the gall bladder, or the female organs.

[12/28/62]

We telephoned Dr. Byron Steele at his office and talked with him regarding Mrs. Hill. He states that he was unable to diagnose Mrs. Hill's condition to any certainty and that since her condition improved greatly while she was hospitalized, he had released her from the hospital and considered her as a well woman. He states that her

pains could have been caused by inflammation of the gall bladder or female organs and that there is also a possibility of appendicitis.

[1/2/63]

Mrs. Virginia Hill came to the office today in a quite sad and broken-hearted mood. She states that she left the Clark residence on 12-28-62 and is presently living with her maternal grandmother, Mrs. Irma Hill, 321½ Wilson Street, Sand Springs, Oklahoma. Mrs. Hill relates that she has been doing some serious thinking about her future and the future of her child. She has already filed for a divorce from the child's father. This young mother feels that she is quite immature and unable to plan for herself or her child and therefore, she would like to give the baby up for permanent adoption. She states that she loves her baby but that she feels she will never be able to give it the kind of home and care it needs. She plans to leave the state and get away from her undesirable relatives and background and try to start a new and better life for herself.

We talked with this young girl about the seriousness of this matter and advised her against making any snap decisions since once she signs the papers, giving her consent to adoption, this would be final and she would never be able to change her mind and have the child returned to her. However, Mrs. Hill states that she has seriously considered this situation from all angles and she feels that this would be the best plan for her and her baby. We told Mrs. Hill that we would contact Mr. Myers, Juvenile Court counselor, and make arrangements for her to be interviewed by the Judge and to sign the necessary legal documents in the presence of the Judge. We asked her to return to this office on 1-7-63.

We telephoned Mr. Myers, Juvenile Court Counselor, and informed him of Mrs. Hill's decision. He stated he would make the necessary arrangements for her to carry out her plan on 1-7-63.

[1/7/63]

On this date Mrs. Hill came to the office in time for her appointment at 11:00 a.m. She states that she still feels the best plan would be for Billy to be adopted and placed in a good home. She also relates that her husband's uncle and aunt, Gail and Jack Baker (address unknown, Sand Springs, Okla.) have filed an application to adopt a baby with some agency, and she asks that her child not be placed with these people because she doesn't want to know where the baby is placed. We interviewed Mrs. Hill at length, obtaining information for a complete social

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history of all relatives. This history will be prepared at a later date.

We took Mrs. Hill to the Juvenile Court Office, where she was interviewed by Mr. Larry Myers, Counselor; and by Tulsa County Juvenile Court Judge Dorothy Young. Mrs. Hill signed legal documents, giving consent to the adoption of her son, Billy Patrick Wayne Hill, in the presence of Judge Young. During this time she became quite emotional and cried. The Judge was very understanding and counseled with this young mother for quite some time.

Mr. Myers relates to us that the Court will serve notice to the father of the child, Darrell Wayne Hill, in the State Penitentiary at McAlester, and then a hearing will be held in the Tulsa County Juvenile Court and permanent plans will be made for Billy Hill.

[1/8/63]

Today we picked up Billy Hill at the Geren foster home and took him to Dr. John Kramer's office for his appointment. Mrs. Geren, foster mother, relates that the baby has a bad cold and again is having trouble breathing. Dr. Kramer diagnosed Billy's condition as bronchitis and gave him an injection of bicillin. The child was also given another blood test to determine if his iron deficiency has improved. Another appointment was set for 1-15-63 at 9:30 a.m.

/s/ HWA
HWA:hm

Complaint
[11/9/62]

A child somewhere the ages of about 9 months and one year, known to the Barnard Nursery, 1523 S. Utica, was placed in the nursery for one day about three weeks ago and as far as can be determined at this time, has been completely abandoned. When the mother left the child, she gave her name only as Mrs. Hill and said she lived in Room 313 at the Bliss Hotel. The manager of the nursery, Mrs. Hess, has tried several times to get in touch with the child's mother at the Bliss Hotel but every time the room is called a girl answered the phone who pretended to be her sister. This person whom Mrs. Hess talked gave first one excuse and then another for not coming to see about the child then finally said that she was sick and in a

the child then finally said that she was sick and in a hospital in Oklahoma City. A day or two ago Mrs. Hess called the room and the girl said her sister was still in the hospital. Mrs. Hess asked her what hospital she was in and she claimed not to know. Mrs. Hess then remarked over the telephone, well, I will just call all the hospitals in Oklahoma City and find out where she is when the woman replied, "I hope you die and go to hell". After the baby had been there about a week, Mrs. Hess told her one time when she talked to somebody if he will just come and get the baby you can forget about the bill because I am afraid he might get sick and I could not do anything for him. The girl remarked she had no way to take care of him. The Juvenile Court went to the nursery – picked up the baby and placed him in the shelter. This worker then called Mrs. Page, manager at the Bliss Hotel, and said the girl had been there, in fact, three girls had rented the room and they skipped out a few days ago not paying her anything for the room for the entire time they had been there. The girl who was supposed to have been the mother of this child was listed on their books as Virginia Hill. She is a small blond girl about 5 feet 2 or 3 inches in height, probably weigh about 95 or 100 pounds. She said she worked at the Mobile Club [illegible] called herself, Mrs. Jim Dalton, Virginia's sister. She was a [illegible]-haired, tall girl. The third girl had signed in as Annete Maybe. Mrs. Page gave the information that she had heard that the girls had gone [illegible] order [illegible] and said that the girl who said she was the mother of the baby was [illegible] pregnant again. She was reported to either have or had [illegible] other children. Mrs. Page then called a negro employee who worked for her at the hotel and had been in touch with the girls and thought he may have had [illegible] about these girls than she has had. However, as

[illegible] not [illegible] or did not care to give any information and was somewhat evasive in answering questions. He said the girls did not go to 302 Raeser Hotel but had a friend who lived there and that they had gone to that room to see him [illegible] last he had heard of any of the three girls – she of them [illegible] worked at the Mobile Club on South Peoria.

A petition was filed and the child was placed in the [illegible].

Case assigned to Myers and referred to the [illegible].

[/s/ Illegible]

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[1/14/63]

On this date Billy Hill was returned to Dr. Kramer's office. Dr. Kramer found his condition to be much improved and no medication was prescribed. Since this child seems to be in good physical condition and has had all required immunizations, Dr. Kramer asked that he be returned in two months for a checkup.

[1/30/63]

On this date a hearing was held in Tulsa County Juvenile Court. Parental rights of Darrel Wayne Hill and Virginia Hill were terminated and permanent custody of Billy Patrick Wayne Hill was given to the Department of Public Welfare with consent to adoption.

[2/14/63]

The following social information was learned from Mrs. Virginia Hill and is presented as an aid to be used in permanent planning for the child.

[Father]

Darrell Wayne Hill was born 9-11-40 in Sperry, Oklahoma. He is of slender build, 5'8" tall and weighs 145 pounds. His nationality is primarily [Dutch]-Irish. He has a fair complexion, blonde hair and blue eyes. Mr. Hill's education has been interrupted by his frequent confinements to penal institutions, however he has done 12th grade work in the McAlester Penitentiary. Mrs. Hill states that she believes her husband prefers the Catholic religion but that he actually has no religious beliefs. This man has asthma and as a child he had a heart murmur. He has always been a very nervous person and could be classified as an excessive drinker. He has also taken morphine and is a frequent user of vallo nasal inhaler. He has worked as a construction worker. He has never served in the armed forces. According to his wife, he is of an uneven disposition. He appears quiet and reserved around strangers but actually is the leader of the outlaw gangs in which he participates. Mrs. Hill relates that when she told her husband of her decision to place the baby for adoption, his reaction was that of resignation. Although he was not happy about the situation, he stated that he had expected it to happen.

Paternal Grandfather – William Leonard Hill, born in 1918, is deceased. He was approximately 5'11" tall and his weight was approximately 173 pounds. He had a medium complexion, dark brown hair, and blue eyes. His nationality was Black Dutch and Indian. His main occupation was

a truck driver. He was a victim of asthma and had a lung condition. This man was killed by law enforcement officials on July 3, 1962, when he was caught in the act of burglary.

Paternal Grandmother – Alta Marie Clark was born in 1919. She is approximately 5'5" tall and weighs 123 pounds. She is of fair complexion and has light brown hair and hazel eyes. She has a 10th grade education. Her nationality is that of the Irish, Dutch and Indian. She has worked as a waitress but has spent most of her life as a housewife. She is presently residing in Arkansas. This woman also has asthma and has had a cancer on her womb.

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Paternal Siblings – Waldrum Bill Hill is 24 years of age, is 6 feet tall and weighs 180 pounds. He is of medium complexion, has dark brown hair and hazel eyes. He has been employed as a construction worker and a truck driver and is presently serving a term in McAlester for burglary. Dennis Morris Hill is 19 years of age, is 6 feet, 2 inches tall and weighs 197 pounds. He is of medium complexion, has dark brown hair and hazel eyes. He has a 9th grade education and his occupation is that of a steel worker. He also has asthma. Phillip Dale Hill, age 16, is 6 feet tall and weighs 187 pounds. He has a fair complexion, blonde hair and blue eyes. He has a 10th grade education and is presently employed as a filling station attendant. He is in

good health. Carolyn Sue Hill is 13 years of age, 5'2" tall, and weighs 115 pounds. She has fair complexion, blue eyes and blonde hair. She is presently in the 8th grade and lives with her mother in Arkansas. According to Mrs. Hill, this girl has a condition diagnosed as possible Leukemia.

Mr. Hill also has three other half-siblings. They are known to Mrs. Hill only as Ronnie and Donnie, who were twins approximately 9 years of age; and Debra, who is 6 years of age. These three children have been adopted.

[Mother] – Letha Virginia Hill was born 9-3-44 in Tulsa, Oklahoma. She is of slight build, is 4'11" tall and weighs 92 pounds. Her nationality is Irish, German and Dutch. She has a fair complexion, light brown hair and hazel eyes. She has an 11th grade education and has worked as a fountain girl and as a magazine salesman. Mrs. Hill states that she was a premature baby and was a "blue baby" and that she was in and out of the hospital until she was 3 years of age. This young girl appears rather quiet and thoughtful. She states her main interests are those of a homemaker. She enjoys cooking and housekeeping. Regarding her pregnancy, Mrs. Hill relates that she always felt fine. She states that she did not seek medical attention until she was six months pregnant. According to her, the delivery was normal. She feels that she is presently in good health.

Maternal Grandfather – Richard Robert Hill was born 10-29-14. He is 5'8" tall, weighs 130 pounds and has a ruddy complextion with light brown hair and blue eyes. He has a 6th grade education and his nationality is Irish, Indian, Black Dutch and French. He was employed for many years at the cotton mill in Sand Springs. His current address is 303 Fairmont Ave., Hot Springs, Arkansas. This man has

been married five times, one of these marriages having been to the current Mrs. Alta Marie Clark, Billy Hill's paternal grandmother. Mr. Hill has a collapsed lung and an asthmatic condition.

Maternal Grandmother – Vida Mae Childress was born 10-24-16 and died in 1953 of cancer. She was approximately 4'11" tall and her weight was 130 pounds. She was of fair complexion, with dark brown hair. Her nationality was that of Irish, Black Dutch and Indian. She was employed for a time at the cotton mill

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at Sand Springs and her usual occupation was that of housewife.

Maternal Siblings – Inez Henderson is a half-sister of Virginia Hill. She is 28 years of age and presently resides in Ada, Oklahoma. Richard Robert Hill Jr. was born 12-1-42. He is 5'9" tall, weighs 167 pounds and has a ruddy complexion. He has dark brown hair, dark blue eyes and a 10th grade education. He also has a nervous condition and according to Mrs. Hill, he sometimes "shakes". He is presently serving time in the McAlester State Penitentiary for car theft. Lillian Jean Reynolds was born 3-19-46 and is 5'6" tall, weighing 125 pounds. She has a fair complexion, dark brown eyes and dark brown hair. She has a 9th grade education and has worked as a waitress. According to Mrs. Hill, this 16-year old sister has been married twice and has had a complete hysterectomy as a result of infection in the female tubes. Donita Wallice Hill, born 12-4-50,

is 4'8" tall and weighs approximately 85 pounds. She has a fair complexion, blonde hair and blue eyes. She is presently residing in the Sand Springs Home and attending Garfield School, where she is in the 5th grade.

[Billy Hill] – The following information concerning this baby was related by his mother. He was born 3-17-62 in Hillcrest Hospital, Tulsa, Okla. The attending physician was Dr. Rupp. The child weighed 7 pounds and 4 ounces at birth. He was bottle fed. According to his mother, he has been a healthy baby except for his asthmatic condition. He is also allergic to orange juice, wool and breaks out when given penicillin shots. He first sat up alone when he was four months old and pulled up at the age of 6 months. He was crawling when he was 5 months old.

This child is presently 21 inches high, weighing 18 pounds and 14 ounches. He has sandy colored hair, a fair complexion and hazel eyes.

/s/ HWA
HWA:hm

[/s/ JL]

Declaration by Arthur Athens

I, Arthur Athens declare under penalty of perjury, the following to be true to the best of my information and belief:

1. My name is Arthur Athens and from the time I was in second grade, I was a neighbor of Jeffrey Landrigan in Bartlesville, Oklahoma. Presently, I reside in Oklahoma City, Oklahoma.

2. I was six or seven years old and in the second grade when my family moved onto Smysor Street in Bartlesville. I attended Limestone Elementary School with the other neighborhood children, including Jeff Landrigan.

3. Jeff and I used to play together: we rode bicycles, shot BB guns, watched television and went to Bible study together at my home. Jeff and I played T-ball together in third grade, but Jeff quit after the first year. I think he was having trouble getting to the practice on time.

4. In my opinion, Jeff never had a chance. He had no supervision when he was growing up because both of his parents worked. From the fourth grade on, Jeff was a latchkey kid. He was the only kid I knew who had his own place until 6:00 or 6:30 p.m., when his parents got home from work. I think he got into more mischief because of this lack of supervision. Jeff's mom and dad were not like the other moms and dads. Dot, his mom, drank in the evenings. I never saw much of her but I know that she would come home from work and have cocktails.

5. In the fourth grade I had my first cigarette with Jeff. He stole a pack from his mom and we both smoked them.

6. In fourth or fifth grade, the Forrests moved into our neighborhood. Jeff started running around with Bobby Forrest, who was a year older than the rest of us. From then on, Jeff and Bobby were always a step ahead of the rest of them as far as getting into trouble. Jeff changed after his birthday party in fourth or fifth grade. He got a motor scooter and started spending more time with Bobby.

7. Jeff knew that he was adopted from a young age. It seemed to bother him and he said that he was not the Landrigans' "real" son. I told him that Nick was his father and he replied that he did not have a father.

8. Jeff never really opened up to me about anything and was a bit of a loner. He was not a team player. He would start something, like Scouts, and then he couldn't stay with it for some reason or another.

9. In seventh grade, Jeff hung out with the hoods at school. He let his hair grow long and wore a leather jacket. In junior high he moved into the basement of his house. He said that he wanted to do his own thing and get away from his parents. Jeff had a lock on his bedroom door.

10. I was scared of both Jeff and Bobby in the seventh grade. For a period of a few weeks I had to run home from the school bus stop each day because they would chase me and beat me up. They bloodied my nose a few times until my dad talked to Jeff's dad. They were bullies.

11. Once in the eighth grade I went over to Jeff's house to check on him because he hadn't been in school that day. The back door was open and I could hear music playing. I went in and found Jeff passed out. There was a bottle of tequila and some marijuana in the room. I was able to wake him up and then he went into the bathroom to throw

up. I figured if he was throwing up then he must be okay. I told my mom about it but she said that Jeff's mom would handle it.

12. In ninth grade, Jeff and Greg Brown got into trouble for smoking marijuana in the woodshop at school.

13. Also in the ninth grade, Jeff took drugs to the point that he almost passed out. I saw the shop teacher, an assistant principal, and a drafting teacher helping Jeff up to the principal's office because he could barely walk. Then an ambulance came and took Jeff away.

14. Greg Brown was a big influence on Jeff because they spent so much time together in high school. Jeff told me that Greg's dad was a big drug dealer.

15. When I was eighteen, I sold Jeff my 1971 Grand Prix before I left for college. He got drunk and wrecked the car. Then he got his sister's, Shannon's, car and got drunk and wrecked it. As far as I knew Jeff was not getting DUI's for this because he was wrecking the cars out in the country.

16. The week of Greg Brown's death, Jeff and Greg were taking some pills called "Purple ass kickers." Jeff told me that they had a big bottle of them over at Greg's house. I think they were downers.

17. I was never contacted by attorneys or investigators appointed to represent Jeff Landrigan at trial, on appeal, or in post-conviction proceedings. Had any attorney or investigator contacted me, I would have disclosed the information stated in this declaration, as well as other information. I also would have been willing to testify on Jeff's behalf at any proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 1st day of October, 1998.

/s/ Arthur Athens
Arthur Athens

Declaration by Donna Clark

I, Donna Clark declare under penalty of perjury, the following to be true to the best of my information and belief:

1. My name is Donna Clark and I am the mother of Kevin Clark. For many years I was a neighbor of the Landrigan family, including Jeff Landrigan. Jeff was friends with my son, Kevin. Presently, I reside in Bartlesville, Oklahoma.

2. I first met Jeff when he was around six years old. Jeff would come over to my house for Bible classes up until the time he was in about sixth grade. I taught the classes through Child Evangelism, a nationwide organization. Jeff was a good boy that gave me no trouble, unlike a few other little boys in the class.

3. When Jeff was somewhere in the age range of fourth to sixth grade, he got too rough with my boys once. They were playing touch football. I told him to leave the boys alone and he talked back to me and was cussing at me. I chased him home and his mother, Dot, told me that I was too rough on my children. I think Jeff could have benefitted from some "tough love." It did not seem like either Dot or Nick did much to try and discipline Jeff.

4. When Jeff was in around seventh grade, unbeknownst to me, he was inside my house and took some photos out of my house without my permission. Jeff then showed these photos to another neighbor boy. I was very upset and never got the photos back. I was informed of this by the mother of the boy that he showed the photos to.

5. It was common knowledge that Dot was an alcoholic. In later years Nick drank too but that was much later. The Landrigans did not socialize with the other neighbors.

6. I was never contacted by attorneys or investigators appointed to represent Jeff Landrigan at trial, on appeal, or in post-conviction proceedings. Had any attorney or investigator contacted me, I would have disclosed the information stated in this declaration, as well as other information. I also would have been willing to testify on Jeff's behalf at any proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this Oct. 1 day of October, 1998.

/s/ Donna Clark
Donna Clark

Declaration by Kevin Clark

I, Kevin Clark declare under penalty of perjury, the following to be true to the best of my information and belief:

1. My name is Kevin Clark and my family lived in the same neighborhood as the Landrigans, including Jeffrey Landrigan, in Bartlesville, Oklahoma. Presently, I reside in Carrollton, Texas.

2. Jeff Landrigan was known to me as "Jefty." I was friends with Jefty from about second through ~~fourth~~ [sixth] grades. We were around each other in group activities; Jefty was one of the gang. He was seven or eight years old when I met him and he was quiet and shy. He fit right in. He looked like us, acted like us.

3. As Jefty grew older, around fifth or sixth grade, he became more defiant towards adults, especially women. He would yell at his mother and she seemed unable to get him to cooperate with her. When he was in fourth or fifth grade she would just give up if she couldn't get him to do something. From my perspective, I found it shocking the way Jefty could talk to her.

4. As a child, I did not realize that Jefty's mom, Dot, was an alcoholic. Years later my mom told me that Dot was an alcoholic. Looking back, I can see signs of her alcoholism. She would come into a room and be confused.

5. Jefty began spending time with the Forrest brothers, especially Bobby, around fifth grade. This seemed to influence his behavior and he became more of a bully. Bobby Forrest was hard to control.

6. From second to fourth grade, Jefty and I would occasionally get into scuffles. Jefty was usually not a good fighter and would ~~always~~ [usually] lose. When Jefty started spending time with Bobby, though, he had a large pocketknife. By fifth grade I did not want to get into a fight with Jefty because he was becoming a bully and I always had it in the back of my mind that he carried the pocketknife. I was afraid that he would use the knife. Jefty, Bobby and Dale were also taking judo lessons. In sixth grade I threw Dale into some bushes and Dale told Jefty about it. I backed down from Jefty because I didn't know if he would quit when I said "uncle" or "I give" like the other kids would.

7. By fourth grade, Jefty was "heading off track." By fourth or fifth grade, he was becoming mean. I feel sort of bad for Jefty because he was not in a perfect home. The Landrigans' parenting style would not suit a strong willed, independent child. I often thought that if Jefty had been raised by my parents, who were very strict, that he would have turned out fine.

8. In junior high, Jefty hung out on the sidewalk where the hoods hung out. He was out there smoking cigarettes with a rough crowd.

9. In eighth or ninth grade, Jefty got arrested at school. The rumor was that he'd beaten up his mom. He was around fourteen at the time.

10. In eighth or ninth grade, I saw Jefty being taken out of school. He had overdosed and could hardly walk. There was a principal and someone else almost dragging Jefty out.

11. Jefty had a "whole lot of freedom" even when he was only fourteen. His parents bought him a motorcycle – they were legal on the streets in Oklahoma if you were at least fourteen. Jefty would ride across town to see friends.

12. When Jefty was around sixteen his dad bought a nice boat. Several years later I saw the boat and it was in poor condition. It was all beat up looking and I suspected that Jefty took it out with his drug buddies.

13. I was never contacted by attorneys or investigators appointed to represent Jefty Landrigan at trial, on appeal, or in post-conviction proceedings. Had any attorney or investigator contacted me, I would have disclosed the information stated in this declaration, as well as other information. I also would have been willing to testify on Jefty's behalf at any proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 10th day of October, 1998.

/s/ Kevin R. Clark
Kevin Clark

Declaration by Joe Harris

I, Joe Harris declare under penalty of perjury, the following to be true to the best of my information and belief:

1. My name is Joe Harris and I went to junior high and high school with Jeff Landrigan in Bartlesville, Oklahoma. Presently, I reside in Bartlesville, Oklahoma.

2. During the time that Jeff and I were in junior high, it was a time of rebellion by youth. It was the early to mid 1970's and the rebelliousness of the 1960's was still being felt in our community.

3. If you were a completely straight kid in the Bartlesville community back then, you were completely ostracized by the other kids. Bartlesville was a wealthy community. When you have all of that money available then anything that you want is then also available. There were lots of drugs available to us when we were in junior high.

4. In junior high, we smoked a lo of marijuana. Jeff and Greg Brown were both really into pills. Greg drank a lot of alcohol and used a lot of Seconal. We all used some pills called "purples" as well as Seconal, Thorazine, Valium, speeders and Placidyl. When Greg was under the influence he was very aggressive and mean. I never really had any problems with Jeff though. He only went off when he was threatened.

5. The crowd that Jeff and I hung around with was a pretty rough group. Many of the people of that group are either dead or in prison. Two of our friends, Randy Florence and Johnny Orr, died in a motorcycle accident. Another friend, Robin Brookshire, is in prison for killing a man. Another friend, Brian Cunningham, shot and killed

himself. Our friend, Lance Booth, is in prison. Jeff's ex-wife, Sandy Martinez, was a mistake from day one. The graduating class of 1980 was just poison.

6. At our junior high there were stabbings and a lot of racial tension. Most of the students I knew were carrying loaded firearms to school – that was just how it was. I carried a loaded weapon to school but Jeff did not carry a gun; he carried a knife. The school was fairly chaotic. Drug transactions took place outside where the smokers hung out and sometimes transactions even took place in the classrooms.

7. Greg Brown was one of the primary drug sellers at our junior high. It was actually Greg's father that was sending Greg to school with the drugs and having him sell them.

8. The kids that dealt drugs at school had a system: you could owe them money and pay them later for the drugs they gave you. Bartlesville was a wealthy community and you could obtain whatever drugs you wanted. There were students passing out in classrooms and the teachers would sometimes just let them sleep. The average age to start smoking marijuana in Bartlesville was around seven or eight years of age. By junior high you were taking pills. Jeff definitely had a drug problem.

9. There were kids that were stealing cars during those years as well. Jeff and Greg were stealing cars and things were getting serious quick for them. By the time we entered high school I did not have as much contact with them because they were both in and out of school.

10. Jeff knew that he was adopted and it was a tender spot with him. Jeff's birth family was a mystery to him.

The Landrigans were fairly well off though and he had a nice car when most of the kids had clunkers.

11. I was told by a friend that Jeff's mom was an alcoholic. I had been over to Jeff's home a number of times but I never saw Jeff's parents at home. Jeff had his own separate living quarters in the basement of their house. There was no sign of parental supervision in Jeff's life that I could see and I never saw any sign of a father figure in Jeff's life. I was never aware that Jeff had a sister.

12. At the time Jeff was growing up in Bartlesville, the city had no social outlets for kids. Jeff had little controls placed on him at home and at school and he rebelled against whatever authority there was at the time because it was the thing to do.

13. I was never contacted by attorneys or investigators appointed to represent Jeff Landrigan at trial, on appeal, or in post-conviction proceedings. Had any attorney or investigator contacted me, I would have disclosed the information stated in this declaration, as well as other information. I also would have been willing to testify on his behalf in any proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 1/10/98 day of October, 1998.

/s/ Joseph D. Harris Sr.
Joe Harris

Declaration by Jane Shannon

I, Jane Shannon declare under penalty of perjury, the following to be true to the best of my information and belief:

1. My name is Jane Shannon and I am a retired juvenile probation officer. Jeff Landrigan was on my caseload as a juvenile offender in Bartlesville, Oklahoma. Presently, I reside in Bartlesville, Oklahoma.

2. I first met Jefty, as he was known to me, when he was fourteen years old. I inherited his case from someone else's caseload. There was something about Jefty that I found very appealing. He sent me a letter from Boley, a facility for delinquent boys. Boley and Helena were the last stops in the Oklahoma juvenile justice system before McAllester, the adult prison.

3. When I saw Jefty at Boley, he was in the custody of the Department of Human Services. To the best of my recollection, Jefty was in Boley because he'd stolen some cars. He was also picked up by the police frequently for violating curfew. None of this was anything major but it did seem to show a pattern with Jefty's behavior.

4. I liked Jefty very much and also liked his adoptive parents, Dot and Nick Landrigan. Jefty caused them much sadness. I tried to get Jefty to talk about things at home but he was very quiet. I had heard from other probation officers that Dot drank a lot. Every time I asked Jeff about this though, he would change the subject; he didn't want to talk about it. Dot did tell me about some physical fights between them, Dot and Nick, and Jefty.

5. Jefty was an angry child. He may have been angry about being adopted. The Landrigans never kept that fact

from him. He would tell me what he thought I wanted to hear about his being adopted such as how lucky he was to be adopted by the Landrigans. I knew that Jefty was evading the issue but I still tried to make headway with him.

6. When Jefty was sixteen or seventeen, he got a girl pregnant. The girl had a miscarriage and Jefty dropped her. Around this same time, there was an interdepartmental hearing regarding Jefty. I wanted to send Jefty back to Boley because I thought this would be his last chance before he turned eighteen. Jefty's parents hired a good attorney to represent him though and Jefty was allowed to go home with them. They all said that he would do fine. I knew that it would not be fine.

7. Jefty drank and did a lot of drugs. He spent quite a lot of time in the county jail back then. This was during the time when juveniles were placed in the county jail. It did not seem to phase him.

8. Jefty and his friend Greg Brown both used a lot of drugs and alcohol. They both got into the drug crowd when they were real young. There was a much bigger drug problem in Bartlesville than anyone was willing to acknowledge.

9. During the incident that resulted in Greg's death, Jefty and Greg both got out of their skulls at the time, drinking and drugging.

10. After Jefty's murder conviction in Oklahoma, both Dot and Nick finally "signed off emotionally" from Jefty.

11. I was never contacted by attorneys or investigators appointed to represent Jefty at trial, on appeal, or in post-conviction proceedings. Had any attorney or investigator

contacted me, I wold have disclosed the information stated in this declaration, as well as other information. I also would have been willing to testify on Jefty's behalf at any proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 10th day of October, 1998.

/s/ Jane Shannon
Jane Shannon

Declaration by Sandra Martinez

I, Sandra Martinez, declare under penalty of perjury, that the following to best of my information and belief:

1. My name is Sandra Martinez and I am the ex-wife of Jeffrey Landrigan. I reside in Bartlesville, Oklahoma.

2. Jeff and I went to junior high school together. He was good friends with my brothers and my cousins. Jeff was a sweet but ornery kid back then.

3. When we were approximately fourteen years old, Jeff and I would get stoned together. I sold Jeff marijuana back then, about one or two joints, two times a week.

4. I did not see Jeff again until I was 17 or 18 years old. I met Jeff in 1980 at the Stratford House rehabilitation center in Austin, Texas where we were both undergoing drug treatment. I was placed in the rehab center because I overdosed on Quaaludes. People thought I was trying to commit suicide but I ~~was just trying to get high~~ [had a drug addicts blackout and overdosed]. Jeff was kicked out of the program because they thought he had stolen prescription drugs from a drug store.

5. Jeff overdosed on Quaaludes before he graduated from high school, when he was approximately 16 or 17 years old. His family found him overdosed in the basement and had to call an ambulance for him. Jeff went into drug treatment several times that I know of.

6. Against the advice of my counselor, I began dating Jeff at the rehab center. When I received a weekend pass I spent my first night out of the center at Jeff's apartment. I remember opening up a cupboard at the apartment and it was full of pills. Jeff told me he would get rid of the pills.

[If you want to ad: that it was agreement in order for us to stay together.]

7. A month or two later I was released from the rehabilitation program and moved in with Jeff and his roommate. About a week later Jeff was arrested by DEA/narcotics agents for the burglary of a drugstore. I borrowed money from my mom to fly home to Oklahoma and Jeff's dad, Nick, bonded him out with $5,000 cash. Nick and I then drove back to Texas and brought Jeff home to live with his dad [and mom] in Bartlesville.

8. Jeff and I began to date again. He was jealous and possessive of me. One night after a party he dropped me off at home. He honked the horn for me to come back out and talk to him. When I wouldn't come back outside he became so angry that he backed his car into my mother's front porch. He then drove off, ran off the road, and [later] was arrested for possession of marijuana that night.

9. When Jeff would drink or get loaded, he would sometimes cry and talk about the fact that he was adopted. I think he and I got married to ease his pain and so he would have something to look forward to. We were married in February of 1981 in Bartlesville. Neither of us graduated from high school.

10. Three weeks after our marriage, Jeff went to prison for the marijuana possession. He served three or four months and was then released. Upon Jeff's release, his parents rented an apartment for us for a few months. They said that it was their wedding present to us since we didn't get to have a honeymoon. For those few months, Jeff's parents paid for everything and we did not have to work. We were young and all we did was drink and get high. We

smoked marijuana in the mornings, when we got home from work and before we went to bed.

11. Jeff was into pills: downers, Valium, Nembutal, dope, as well as alcohol. He used barbiturates, sedatives, and alcohol. It is difficult for me to quantify Jeff's drug intake because he did a lot of it behind my back.

12. Jeff was an alcoholic. When he drank, he usually got drunk. He could not have just one or two drinks.

13. In Jeff's adoptive family he had all of the material things he could ever need; Dot and Nick provided very well for him. They bought him everything he ever wanted, such as a new car. They even supported his drug habit, unknowingly, by giving him money. However, they were always letting other people deal with him and his problems, like doctors or the rehab centers. Whenever he got into trouble, they always bought him out.

14. Jeff and his adoptive mother, Dot, did not have a good relationship. Nick, his father, was more laid back. Dot, however, would scream and holler. She was mentally abusive to Jeff. Dot was an alcoholic.

15. Dot used to drink whiskey but she eventually got to where all she drank was vodka. She would start drinking at 5:00 a.m. and then go to work. Then she would resume drinking upon her return home from work. Nick did all of the housework and worshiped his wife. He didn't touch alcohol. I eventually took over the cooking and cleaning from Nick because when I came into the family he was getting older. We had a nightly routine with Dot: we fed her dinner between 8:30 and 9:00 p.m., she'd pass out around 9:30 p.m. and we would put her to bed.

16. After Jeff was sentenced for the Greg Brown incident, Dot's employer basically forced her to retire. Then she would drink at home all day. After she had a seizure she had to be placed into a nursing home.

17. On the night that Greg Brown died, Jeff had been drinking at home before we went to the party. At the party, Greg and Jeff were playing quarters with beer and whiskey. The two of them argued over the word "punk" and Greg pushed Jeff up against a wall. He wouldn't let Jeff leave so I tried to hold Greg so Jeff could leave. Jeff went outside and Greg followed him. He backed Jeff up against the trailer, shoved him into the wall and said that he was going to kill him. One of them had a piece of aluminum off of the trailer in their hand but I do not recall which one of them it was. Greg pulled his hand back like he was going to hit Jeff and Jeff put his arm out. I thought he was hitting Greg until I saw the ~~knife~~ [blood]. I yelled for people to call 911 but they all hid their drugs and guns first. It took the ambulance 25 to 35 minutes to get to the trailer because they got lost in the trailer park. Greg died before they got him to the hospital. Jeff took off on foot but turned himself in later that night. He knew what Greg was capable of because he'd seen Greg beat people up before. Greg was a big guy: 6'1", 225 lbs.; Jeff was little: 5'7", 180 lbs.

18. Jeff had a court appointed attorney with no prior murder trial experience for his trial in Oklahoma. The attorney was so bad that he was going to leave Greg Brown's mother's friend on the jury until I point out the relationship to him and she was not allowed to sit as a juror. The investigator that assisted before trial, George Yoacham, was not a real investigator either. He was a kid from a wealthy family that owned Yoacham's Saddle Shop.

He did not know what he was doing either. Jeff received a life sentence in this case that was eventually reduced to 40 years: 20 in, 20 out.

19. Jeff was sometimes violent when he drank. He would push and get aggressive by throwing things.

20. Jeff has been institutionalized since he was a young boy. He spent time in juvenile facilities, rehabilitation centers, and then in prison.

21. I was sentenced to four years in prison in 1996 for [()possession of cocaine[)] [Revocation of probation] I ended up serving 63 days and got my GED while I was in prison.

22. Jeff and I have one daughter together. When she was a little over a year old, Dot accidentally dropped her in the bathtub. Dot was drunk at the time and our daughter had bruises as a result. I would not take my children back over to Dot's and Nick's after that. Dot retaliated by telephoning Child Welfare Services to do a welfare check on my children.

23. When our daughter was between the ages of 9 and 12 she chased her older brother through the house with a butcher knife. She was angry because he had been teasing her. She threatened to kill him.

24. Our daughter was kicked out of school two times in seventh and eighth grade for cussing her teacher out. This past year she was kicked out from November through January for the same reason. She was kicked out again three days before school let out. Our daughter was coming home or being sent home from school every other week. She was out of school during October, November, and December of 1997. Three weeks after she returned to school, she was kicked out again.

25. Our daughter started skipping school at the age of thirteen. Jeff was a delinquent by the age of nine and I was skipping school by the age of 12½. I lived in a home by the time I was fourteen and was on my own at fifteen. Because of my background and Jeff's background, I am very concerned about our daughter.

26. Our daughter is currently in treatment for behavioral problems at Shadow Mountain hospital in Bartlesville. She is still working on her education but in addition is receiving individual and group psychotherapy [and counciling].

27. Jeff and I divorced after he went to prison for the murder of Greg Brown.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 14th day of November, 1998.

/s/ Sandra D. Martinez
Sandy Martinez

Declaration by Otis Schellstede

I, Otis Schellstede declare under penalty of perjury, that the following it true to the best of my information and belief:

1. My name is Otis Schellstede and I was one of Jeff Landrigan's teachers at Central Middle School in Bartlesville, Oklahoma. I knew Jeff as "Jefty."

2. Jefty was one of my students. I liked him very much and thought he was a real good boy. His father worked for City Services and his parents were both fine people.

3. Jefty's troubles began when he started hanging around with Greg Brown. Greg Brown was smart and clever. He was a leader and Jeff was a follower.

4. I used to follow Greg Brown around in the halls at the school trying to catch him with drugs. I was not able to catch him. I once went to Greg's father, Mr. Brown, to try and talk to him about Greg. I found his father intimidating.

5. To the best of my recollection, Jefty was one of the first students that I ever had to send to the hospital to have his stomach pumped for drugs.

6. I was never contacted by attorneys or investigators appointed to represent Jefty at trial, on appeal, or in post-conviction proceedings. Had any attorney or investigator contacted me, I would have disclosed the information stated in this declaration, as well as other information. I also would have been willing to testify on Jefty's behalf at any proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 1st day of October, 1998.

/s/ Otis Schellstede

Declaration of Robert Martinez

I, Robert Martinez declare under penalty of perjury, the following to be true to the best of my information and belief:

1. My name is Robert Martinez and I am the brother of Sandy Martinez, the ex-wife of Jeffrey Landrigan.

2. I first met Jeff when I was hitchhiking with my cousin, Eric Blackfox. I did not become close to Jeff until 1981 when he married my sister, Sandy.

3. Jeff's adoptive mother was an alcoholic. She was always drunk. She drank hard liquor – vodka – and was an arrogant drunk. Jeff and his mother had a bad relationship. They would argue, fight, holler and scream when Jeff wanted money.

4. Jeff got along better with his adoptive father, Nick. If Jeff didn't have the money for rent, Nick would cover it for him.

5. Jeff didn't talk about his childhood but it looked to me like he'd had everything he'd ever wanted from a material point of view.

6. Jeff was really good with Sandy's son, Chris. He treated him well and tried to be a good father to him.

7. On the night of Greg Brown's death, I was at the party with Jeff and Sandy. Jeff was pushed into the altercation and it was a freak situation. Greg pushed Jeff around in the trailer and continued as the instigator outside of the trailer with Jeff.

8. Greg was known throughout school to be violent. He was a large man: 6'1", 220 pounds. He drank and did a lot of downers. Greg was a Quaalude guy.

9. Greg and Jeff called each other "punk" that night and Greg went off on Jeff. This was after they had played quarters, a drinking game, with whiskey. My sister Sandy and I were the only sober ones there. Greg threw Jeff into the wall and told him he was going to kick Jeff's ass. After the stabbing, Jeff freaked out and took off running.

10. There were three other people at the party besides us. One of them was going to shoot Jeff after the stabbing and they waited to call the ambulance. It seemed like it took the ambulance forever to get to the trailer. It was probably 20 minutes before the ambulance arrived. Other witnesses at Jeff's trial perjured themselves. I was the one who brought up how the other people at the party were going to shoot Jeff after the stabbing and how they had waited to call the ambulance.

11. Jeff's biological daughter is just like Jeff when he was young. His daughter currently lives with me because she needs more structure than her mom can provide for her. She is also attending Shadow Mountain hospital for education and treatment.

x. I was never contacted by attorneys or investigators appointed to represent Jeff Landrigan at trial, on appeal, or in post-conviction proceedings. Had any attorney or investigator contacted me, I would have disclosed the information stated in this declaration, as well as other information. I also would have been willing to testify on Jeff's behalf at any proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 1st day of October, 1998.

/s/ Robert Martinez, Jr.
Robert Martinez

Declaration by George LaBash

I, George LaBash, declare under penalty of perjury the following to be true to the best of my information and belief:

1. I am an investigator employed by the Office of the Maricopa County Public Defender. I have been employed by the office for approximately thirteen years. In 1990, I was the supervising investigator of Group B in the public defenders office.

2. On or about March 2, 1990, I was assigned by the office to the case titled "Jeffrey Page." Jeffrey Page is known to me as Jeffrey Landrigan. Dennis Farrell, an assistant county public defender, was the attorney assigned to the case.

3. Mr. Farrell did not ask me to do much on the case. I did not interview Mr. Landrigan nor did I attend the trial. My role was limited to what Mr. Farrell directed me to do.

4. During my investigation, I was instructed to only deal with the facts of the case. I would not perform a task or conduct an inquiry that I was not specifically instructed to perform.

5. I am not aware of whether Mr. Farrell conducted an investigation, or if he did, the extent of his investigation. Mr. Farrell and I did not coordinate with each other and I found this to be quite frustrating. For example, during the time the investigation was being conducted, I did not know that a psychologist met with Mr. Landrigan. I only learned of that fact recently.

6. In all, I worked thirteen hours on Mr. Landrigan's case. One hour of that time was spent waiting at the

county motor pool for an automobile. It turned out that no car was available for use on that date.

7. On one occasion I had a brief telephone conversation with Mr. Landrigan's mother. That conversation was limited to a guilt/innocence issue. Other than that brief encounter, I had no contact with any member of Mr. Landrigan's family.

8. If I would have been asked to conduct research or investigation regarding a client's family history, I would have done so because it was my responsibility. At that time and to present date, I have never conducted a mitigation investigation.

9. I do recall that after Mr. Landrigan's case, I attended a seminar where I was instructed about mitigating evidence and sentencing investigation in capital cases. That was the first time I became aware of the necessity for conducting an investigation for the sentencing hearing in a death penalty case.

10. At the time of Mr. Landrigan's trial, the caseload in the county public defenders office was extremely high. In addition, the office was "budget oriented" regarding out of town travel. The office would not approve out of town travel for the investigators.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 21 day of September, 1998 at Phoenix, Arizona.

/s/ George LaBash
George LaBash

[Handwritten In Original]

The poem is from Jeff after he found out who and where I was and I had not been to vist him any more after the 1st vist in Cummins Okla.

Jeff's adopted mother told me that from the age of 5 yrs. on he would beg her to tell him who his natural parents were. They refused so he found out by getting into their safe and finding his paper work so he knew Darrel Wayne Hill & I were his natural parents. He became obsessed with finding us. He took to drinking at a very early age because Dot his moma was an alcoholic (and she would walk around nude in front of him) and I believe that with Dot & Nick drinking & partying with all their socalite friends and his desire to be a "normal" child and the blood link to Darrel & I are what has messed up his whole life. Darrel went to prison when Jeff (Billy Patrick Wayne Hill) Landrigan was 3 months old. I was 17 by then no job exp. but I took a job at the Lot a burger-in Tulsa and tried to keep him. I had no help from anyone and when I applied for welfare assistance they took my baby, by order of Judge Lamb. Harold Arrowood was the social worker who took my baby and delievered him to the Landrigans. I lost all desire to live for 10 years then I pulled out of it and got away from my former life & so-called friends. Darrel killed a policeman at a road-side park in Ark. somewhere, he's on Death Row in Ark., has been for about 10 or 11 years. Jeff is <u>just</u> like him! They look alike, talk alike, sound alike and think alike. Jeff needs help mentally like his father did.

Thank You
/s/ Virginia Gipson
(602) 342 3861 home
602 344-8841 work

Declaration by Mickey McMahon

Mickey McMahon declares under penalty of perjury the following to be true to the best of his information and belief.

1) I am a psychologist licensed to practice in the State of Arizona, although I have only been in a very small part-time practice since December of 1995 since the illness and death of my father. I have been certified and then licensed in Arizona from 1974 through the present. I received my doctoral degree in 1973 from Arizona State University. My area of specialization is Clinical Psychology.

2) I was retained by Dennis Farrell, trial counsel for Jeffrey T. Landrigan. Mr. Landrigan was facing a possible death sentence arising out of a homicide.

3) Mr. Farrell telephoned me and asked if I would conduct a psychological evaluation on Mr. Landrigan. I met with Mr. Farrell and informed hm that I would see Mr. Landrigan and obtain an initial impression, then report back to him regarding my impressions and suggest any further psychological avenues that needed to be pursued.

4) I recall an interview with Mr. Landrigan in which I obtained a clinical impression of him, a background history, and conducted brief psychological testing to aid me in gaining an impression of his personality and emotional status.

5) As a result of my initial and only meeting with Mr. Landrigan, designed to gain a first impression and delineate the necessary next steps to be performed, a number of questions were raised in my mind that needed

to be checked out before I could give any definitive opinion. However, those questions were never resolved due to the fact that I was not able to follow up on my concerns and observations in the usual and customary manner.

6) For example, I was not authorized to conduct the next step in psychological testing that would have told me if that there were any cognitive or neuropsychological deficits not observed during just an interview, and whether or not even more testing, as a third step, would be necessary to pin down any deficits found. I was also not authorized to seek information from records or significant others that might also have suggested deficits not typically seen in solely an interview. I was also not supplied, or given the opportunity to share, information such as might have been developed by an investigator.

7) I was then surprised by Mr. Farrell when he asked me to write a psychological reports since it was my understanding that only my impressions were sought after the initial meeting with Mr. Landrigan. I informed Mr. Farrell that I preferred not to write report based on only one interview with Mr. Landrigan. ~~H~~f [I /s/ MM] further stated that much more work was needed to provide an appropriate psychological study for a death penalty case, whether that work be done by myself or someone else.

8) Mr. Farrell informed me that the Public Defenders Office was operating under a tight budget and the office would not authorize the expenditure of more than $350 (the fee typically paid for much more minor offenses than first degree murder with the possibility of a death sentence).

9) Mr. Farrell then informed me that the Public Defenders Office required a psychological report, and I

could simply write up my impressions so the office would have something documented in the file. From the little that Mr. Farrell told me, it seemed that either he, or his superiors, wanted a written report to document the fact that something had been done. Mr. Farrell clearly stated that he needed a written report to justify the expenditure of funds to pay me what appeared to have been a predetermined $350 fee, regardless of what I found on my initial interview with Mr. Landrigan.

10) My experience with Dennis Farrell on this case was quite different from the working relationship I had with counsel on other death penalty cases in which the psychological study went through a series of steps, each step being reviewed for its completeness, and plans for further investigation and authorization for funds made prior to the authorization of the subsequent step. It was also my experience that counsel would brief me on relevant information an investigator had developed and/or set up meetings between myself and the investigator to share information and plan further information gathering. There was often a discussion of how to confirm information from independent sources, whether that involved the investigator conducting the interview with significant others or myself. None of this occurred with Mr. Farrell.

11) My conclusion was that I did not want to continue on the case under these conditions, although I did make an attempt to put as much unconfirmed information in the report I did agree to write as I could, in the hope that someone would follow-up on what I had done, even go much further. Whether or not that was done, I have no personal knowledge, never being contacted further on the case.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 3 day of November, 1998 at Phoenix, Arizona.

/s/ Mickey McMahon
Mickey McMahon

ARIZONA SUPERIOR COURT, PIMA COUNTY	CASE NO. **CR-28677**
	DATE: April 11, 1997
JUDGE: HON. JOHN LINDBERG	
COURT REPORTER: NONE	
STATE OF ARIZONA	Thomas J. Zawada
VS.	
JOHN PATRICK EASTLACK Date of Birth: 12/12/67	Carla G. Ryan Natman Schaye

Special Verdict in a Capital Case

(Filed Apr. 11, 1997)

This is the time set for sentencing in CR-28677, State of Arizona v. John Patrick Eastlack. On April 11, 1991, the defendant, John Patrick Eastlack, was adjudged Guilty by the Court, upon the jury verdicts in Counts 1-9.

There being no legal cause why the Court cannot now proceed with sentencing, first as to the capital counts 7 & 8, then as to the non-capital counts.

AS TO COUNTS SEVEN AND EIGHT, the first degree murder of Leicester Sherrill and Kathryn Sherrill:

The Court finds, based upon the jury verdicts herein, that the state has proven beyond a reasonable doubt the aggravating circumstance set forth in A.R.S. § 13-703(F)(8): the defendant was convicted by a jury of the first degree murder of Kathryn and Leicester Sherrill. Each conviction serves as an additional homicide with respect to the other, and thus satisfies this aggravating circumstance.

DATE 4-15-97 BY [Illegible] Deputy /s/ L.J. Rentschler Deputy Clerk

AS TO COUNT SEVEN, the Court finds, based upon the trial transcript herein, that the state has proven beyond a reasonable doubt the aggravating circumstance set forth in A.R.S. §13-703(F)(6), that the defendant committed the murder in an especially heinous, cruel, or depraved manner.

The murder was especially cruel as evidenced by the following facts: (1) the defendant knew or should have known that his actions would cause Mr. Sherrill to suffer both emotionally and physically; (2) Mr. Sherrill was not rendered unconscious by the defendant's first blow and he must have suffered great physical pain from his wounds until he died or lost consciousness; (3) Mr. Sherrill was found barricaded in a separate area of his home from his wife and, due to his separation from her at death, he must have experienced considerable mental anguish caused by his uncertainty as to her welfare and as to his own fate.

The murder was especially heinous or depraved as evidenced by the following facts: (1) the gratuitous violence inflicted upon the victim; (2) by reason of the victim's age and physical condition, the victim was helpless to resist or thwart the defendant.

AS TO COUNT EIGHT, first degree murder of Kathryn Sherrill:

The Court finds, based upon the trial transcript herein, that the state has proven beyond a reasonable doubt the aggravating circumstance set forth in A.R.S. §13-703(F)(6), that the defendant committed the murder in an especially heinous, cruel, or depraved manner.

The murder was especially cruel because: (1) the defendant knew or should have known that his actions

would cause Mrs. Sherrill to suffer both emotionally and physically; (2) because the evidence showed that Mrs. Sherrill was not rendered unconscious by the defendant's first blow but was alive for some period while she suffered additional violence and must have suffered great physical pain from her wounds until she died or lost consciousness; (3) the victim was found barricaded in a separate area of her home from her husband, and, due to her physical separation from her husband, she must have experienced considerable mental anguish caused by her uncertainty as to his welfare and as to her own fate.

The murder was especially heinous or depraved as evidenced by the following facts: (1) the gratuitous violence inflicted upon Mrs. Sherrill; (2) the fact that, by reason of her age and physical condition, Mrs. Sherrill was helpless to resist or thwart the defendant.

THE COURT having found two aggravating circumstances as to each capital count, the defendant is death eligible under Arizona law on both counts.

AS TO MITIGATION: as required by law, the Court has considered all relevant facts, documents, testimony, and arguments proffered by the defendant in determining whether to impose a sentence less than death. The Court finds that the following statutory mitigating factors listed in A.R.S. 13-703(G) have been proven by a preponderance of the evidence: (1) The defendant's capacity to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; and (2) the defendant's age, by reason of his maturity level, at the time of the offense.

As to non-statutory mitigation, which the Court is compelled by law to consider, the Court finds to have been proven by a preponderance of the evidence the following:

(1) The effect of the defendant's genetic history;

(2) That the defendant suffers from fetal alcohol effect;

(3) That as a result of the combination of the defendant's genetic history and fetal alcohol effect, the defendant has a demonstrated limited ability to comprehend cause and effect;

(4) That as a result of the combination of the defendant's genetic history and fetal alcohol effect, the defendant has demonstrated impaired judgment;

(5) That, as a result of the combination of the defendant's genetic history and fetal alcohol effect, the defendant lacks control over behavior responses;

(6) The defendant's ability to function in a structured environment;

(7) The defendant's non-violent history.

Further, the Court finds that the mitigating circumstances relating to or caused by the defendant's genetic and biological background have been shown to have a connection to the defendant's conduct during the commission of the offense.

Having weighed these statutory and non-statutory mitigating circumstances against the aggravating circumstances, the Court finds that the mitigating circumstances are sufficiently substantial to call for leniency and that imposition of the death penalty would be inappropriate under the circumstances of this case.

Therefore, as to Counts Seven and Eight, it is ORDERED the defendant be committed to the custody of the Arizona Department of Corrections for two terms of life imprisonment, to be served consecutively. These sentences are to run from April 11, 1991, the date of the original sentencing in this matter.

NON-CAPITAL COUNTS

The defendant has been found guilty by jury verdict of Counts One through Six, and Count Nine of the indictment as follow:

Count One, second degree escape, a nondangerous, repetitive, Class 5 felony with two prior non-dangerous felony convictions in Pima County Superior Court Cases CR-17866, and CR-24268 committed on August 29, 1989 in violation of ARS 13-2503 (A)(1) and (B); 13-604 (C);

Count Two, burglary in the second degree, a nondangerous, repetitive, Class 3 felony with two prior nondangerous felony convictions in Pima County Superior Court Cases CR-17866, and CR-24268 committed on August 30, 1989 in violation of ARS 13-1507 and 13-604(D);

Count Three, burglary in the second degree, a nondangerous, repetitive Class 3 felony with two prior nondangerous felony convictions in Pima County Superior Court Cases CR-17866, and CR-24268 committed on September 1, 1989 in violation of ARS 13-1507 and 13-604(D);

Count Four, arson of an occupied structure, a nondangerous, repetitive Class 2 felony, with two prior nondangerous felony convictions in Pima County Superior Court

cases CR-17866, and CR-24268 committed on September 1, 1989 in violation of ARS 13-1704 and 13-604(D);

Count Five, theft by control (value over $100 but less than $250), a nondangerous, repetitive Class 6 felony with two prior nondangerous felony convictions in Pima County Superior Court Cases CR-17866, and CR-24286 committed on September 1, 1989 in violation of ARS 13-1802(A) and (C) and 13-604(C);

Count Six, burglary in the first degree, a nondangerous, repetitive, Class 2 felony, with two prior nondangerous felony convictions in Pima County Superior Court Cases CR-CR-17866, and CR-24268 committed on September 1, 1989 in violation of ARS 13-1507 and 13-604(D);

Count Nine, theft by control, a nondangerous, repetitive Class 6 felony, with two prior felony convictions in Pima County Superior Court Cases CR-17866, and CR-24268 committed on September 1, 1989 in violation of ARS 13-1802(A)(1) and (c) and 13-604(D).

NON-CAPITAL AGGRAVATION

As to counts 1 through 6 and 9, the Court finds the following aggravating factor: prior criminal record.

As to Counts 2 through 6 and 9, the Court finds the following aggravating factor: defendant was an escaped prisoner at the time of the offense.

The Court finds that none of the mitigating circumstances presented in this case are applicable to the non-capital counts or outweigh the forgoing non-capital aggravating factors.

SENTENCING ON NON-CAPITAL COUNTS

Count One: It is ORDERED defendant be committed to the custody of the Arizona Department of Corrections for the aggravated sentence of six (6) years and said sentence is to run consecutively to the sentence imposed in CR-24268 and Counts Seven and Eight in this case;

Count Two: It is ORDERED defendant be committed to the custody of the Arizona Department of Corrections for the aggravated sentence of twenty (20) years, which sentence is to run consecutively to Counts 1, 7 and 8.

Count Three: it is ORDERED defendant be committed to the custody of the Arizona Department of Corrections for the aggravated sentence of twenty (20) years.

Count Four: it is ORDERED that defendant be committed to the custody of the Arizona Department of Corrections for the aggravated sentence of twenty-eight (28) years.

Count Five: it is ORDERED defendant be committed to the custody of the Arizona Department of Corrections for the aggravated sentence of four and one-half (4.5) years.

As to Counts 3, 4, and 5, the sentences are to run concurrently with each other, but consecutively to the sentences imposed in Counts 7, 8, 1, and 2.

Count Six: it is ORDERED defendant be committed to the custody of the Arizona Department of Corrections for the aggravated sentence of twenty-eight (28) years.

Count Nine: it is ORDERED defendant be committed to the custody of the Arizona Department of Corrections

for the aggravated sentence of four and one-half (4.5) years.

As to Counts Six and Nine, the sentences shall run concurrently with each other, but consecutively to the sentences imposed in Counts 7, 8, 1, 2, 3, 4, and 5.

The sentences herein imposed are to commence and date from April 11, 1991, the date of the original sentencing, with no credit for time served prior to that date.

FILED IN Court:
Commitment Order.
Appeal Rights

[Fingerprint omitted in Printing]

Fingerprint –
John Patrick Eastlack

/s/ John E. Lindberg
HON. JOHN LINDBERG

L.J. Rentschler
Deputy Clerk

Fingerprint on signature page.

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Department of Corrections – 1 cert.

664 (7)

No. 05-1575

In The
Supreme Court of the United States

DORA B. SCHRIRO, et al.,

Petitioners,

vs.

JEFFREY TIMOTHY LANDRIGAN, a.k.a.
BILLY PATRICK WAYNE HILL,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

PETITIONERS' BRIEF ON THE MERITS

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CAPITAL CASE
QUESTIONS PRESENTED

Respondent Jeffrey Landrigan actively thwarted his attorney's efforts to develop and present mitigation evidence in his capital sentencing proceeding. Landrigan told the trial judge that he did not want his attorney to present any mitigation evidence, including proposed testimony from witnesses whom his attorney had subpoenaed to testify. On post-conviction review, the state court rejected as frivolous an ineffective assistance of counsel claim asserting that if counsel had raised the issue of Landrigan's alleged genetic predisposition to violence, Landrigan would have cooperated in presenting that type of evidence.

1. In light of the highly deferential standard of review required under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), did the Ninth Circuit err by holding that the state court unreasonably determined the facts when it found that Landrigan "instructed his attorney not to present any mitigating evidence at the sentencing hearing"?

2. Did the Ninth Circuit err by finding that the state court's analysis of Landrigan's ineffective assistance of counsel claim was objectively unreasonable under *Strickland v. Washington*, 466 U.S. 668 (1984), notwithstanding the absence of any contrary authority from this Court in cases in which (a) the defendant waives presentation of mitigation evidence and impedes counsel's attempts to do so, or (b) the evidence the defendant subsequently claims should have been presented is not mitigating?

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OPINIONS BELOW

An *en banc* panel of the United States Court of Appeals for the Ninth Circuit held that Landrigan established a colorable claim of ineffective assistance of counsel entitling him to an evidentiary hearing in district court. *Landrigan v. Schriro*, 441 F.3d 638 (9th Cir. 2006) (Pet. App. A.) The *en banc* ruling reversed a unanimous three-judge Ninth Circuit panel decision that had upheld the district court's judgment denying federal habeas relief. *See Landrigan v. Stewart*, 272 F.3d 1221 (9th Cir. 2001) (panel decision) (Pet. App. B); *Landrigan v. Stewart*, No. CIV-96-2367-PHX-ROS (D. Ariz. Dec. 15, 1999) (Pet. App. C). *See also State v. Landrigan*, 859 P.2d 111 (Ariz. 1993) (J.A. at 53).

STATEMENT OF JURISDICTION

The Ninth Circuit filed its decision on March 8, 2006. Petitioners timely filed a petition for writ of certiorari, which this Court granted on September 26, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of Counsel for his defence.

STATEMENT OF THE CASE

1. Respondent Jeffrey Landrigan is on death row in Arizona for a first-degree murder he committed in December of 1989. (J.A. at 54.)

In November of 1989, Landrigan escaped from an Oklahoma Department of Corrections Facility, where he was serving prison terms for a 1982 murder and a 1986 prison stabbing. (*Id.* at 56; Pet. App. B at 2.) Soon thereafter, Landrigan arrived in Phoenix, Arizona, where he met the murder victim, a homosexual man who often tried to "pick up" men by showing them money. (J.A. at 54.)

On December 13, 1989, Landrigan went to the victim's apartment, where the two of them drank beer and socialized. The victim, who had picked up his paycheck earlier that day, called a friend to invite him to come over to "party" with "Jeff." (*Id.*) The victim called his friend a second time to describe sexual activities he said he was engaging in with Landrigan, and he called a third time to have his friend talk to Landrigan about a possible job. (*Id.*)

At some point after the phone conversations, Landrigan stabbed the victim and strangled him to death with an electrical cord. Landrigan left the victim face down on the bed in a pool of blood with facial lacerations and puncture wounds on his body. (*Id.* at 55.) An ace of hearts, from a deck of cards depicting naked men in sexual poses, was carefully propped up on the victim's back, and the rest of the deck was strewn across the bed. The apartment had been ransacked, and the victim's paycheck was missing. (*Id.*)

When Landrigan was questioned, he denied knowing the victim or having ever been in his apartment. However,

he was wearing the victim's shirt when he was arrested, and seven fingerprints taken from the victim's apartment matched Landrigan's. A shoe impression found in spilled sugar at the apartment matched Landrigan's tennis shoes, and blood on one of Landrigan's shoes matched blood on the victim's shirt. (*Id.* at 55-56.)

Landrigan had three telephone conversations with his ex-girlfriend in December of 1989. During one of those conversations, Landrigan told her that he was "getting along" in Phoenix by "robbing." Landrigan placed the last call from jail sometime around Christmas and told his ex-girlfriend he had "killed a guy . . . with his hands" about a week earlier. (*Id.* at 56.)

2. After a jury convicted Landrigan of murder, burglary and theft, the trial court considered evidence of aggravating and mitigating circumstances. The State established two statutory aggravating circumstances: (1) Landrigan's prior conviction of a felony involving the use or threat of violence; and (2) commission of the murder for pecuniary gain. (*Id.*) Defense counsel presented a sentencing memorandum detailing evidence of Landrigan's long history of drug abuse as possible mitigation, but Landrigan impeded counsel's efforts to develop other potentially mitigating evidence. (*Id.* at 66-67; Pet. App. D at 4-21.)

Landrigan's counsel subpoenaed Landrigan's biological mother and his ex-wife to testify at the sentencing hearing. However, Landrigan instructed them not to cooperate or testify. (Pet. App. D at 2.) When counsel attempted to put on the record the type of mitigation evidence he planned to elicit from Landrigan's family members, Landrigan repeatedly interrupted and

undermined counsel's efforts to portray Landrigan in a favorable light. (*Id.* at 5-9.)

Counsel attempted to soften the fact that Landrigan had previously murdered his best friend, Greg Brown, suggesting that the murder had elements of self-defense. Counsel stated that Landrigan was walking away when Brown, a much larger man, rushed up and attacked him. Counsel indicated that Landrigan, who happened to be carrying a knife, defended himself and unfortunately, killed Brown. (*Id.* at 8-9.) Landrigan interrupted, however, and made clear that his attorney was not telling the story correctly. Landrigan stated, "When we left the trailer, Greg went out of the trailer first. My wife was between us. I pulled my knife out, then I was the one who pushed her aside and jumped him and stabbed him. He didn't grab me. I stabbed him." (*Id.* at 9.)

Landrigan similarly interjected himself when counsel tried to couch Landrigan's assault on another inmate as self-defense by suggesting that Landrigan had been threatened by the victim, who was a friend of Greg Brown and Greg's father. Landrigan stated, "That wasn't Greg Brown's dad's friend or nothing like that. It was a guy I got in an argument with. I stabbed him 14 times. It was lucky he lived. But two weeks later they found him hung in his cell." (*Id.*)

Landrigan again interrupted when counsel tried to burnish Landrigan's troubled past by indicating that before Brown's murder, Landrigan, for at least some period of time, was a "loving, caring husband," who was taking care of his wife and her child by working at a golf course during the year-and-a-half preceding the killing. Landrigan explained: "Well, I wasn't just working. I was

doing robberies supporting my family. We wasn't married. We wasn't married in Arizona. We lived in Oklahoma. I mean, you, he's not getting the story straight. Why have him tell somebody else's story in the first [expletive]ing place?" (*Id.* at 7.)

Finally, when the court asked Landrigan if he wanted to say anything in his own behalf, he stated:

> Yeah. I'd like to point out a few things about how I feel about the way this [expletive], this whole scenario went down. I think that it's pretty [expletive]ing ridiculous to let a fagot [sic] be the one to determine my fate, about how they come across in his defense, about I was supposedly [expletive]ing this dude. This never happened. I think the whole thing stinks. I think if you want to give me the death penalty, just bring it right on. I'm ready for it.

(*Id.* at 16.)

The trial court considered the information presented at the sentencing hearing, as well as defense counsel's sentencing memorandum, then found as mitigation that Landrigan loved his family and his family loved him, and that the jury had not found premeditation. The court ruled, however, that the mitigation was insufficient to warrant leniency, and imposed a death sentence. The court stated:

> I find the nature of the murder in this case is really not out of the ordinary when one considers first degree murder, but I do find that Mr. Landrigan appears to be somewhat of an exceptional human being. It appears that Mr. Landrigan is a person who has no scruples and no regard for human life and human beings and

> the right to live and enjoy life to the best of their ability, whatever their chosen lifestyle might be. Mr. Landrigan appears to be an amoral person.

(*Id.* at 23.) The court also imposed a 20-year prison term for the burglary conviction and 6 months in jail for theft. (*Id.* at 24.)

Landrigan appealed his convictions and sentences to the Arizona Supreme Court. The court denied the appeal and upheld Landrigan's death sentence after independently reviewing the aggravating and mitigating circumstances. (J.A. at 62-67.)

3. In January of 1995, Landrigan filed a petition for post-conviction relief raising several claims, including one that his trial counsel was ineffective at sentencing for failing to present mitigating evidence. Landrigan submitted an affidavit stating that if his attorney had discussed with him the theory of a biological component to violence in his family, he would have allowed that type of evidence to be presented. (Pet. App. E at 1-2.) His affidavit did not allege, however, that he did not understand the general concept of mitigation or that he would have permitted presentation of any other type of evidence. (*Id.*)

The same judge who sentenced Landrigan considered and rejected the post-conviction claim, holding that it was both frivolous and precluded.[1] (Pet. App. F at 3-5.) The

---

[1] The basis of the preclusion ruling was that Landrigan had raised another claim of ineffective assistance of counsel at sentencing on direct appeal. (Pet. App. F at 5.) Although Petitioners initially asserted a procedural bar regarding this claim in federal court, they did not challenge the district court's ruling that the claim is not procedurally barred.

judge noted that Landrigan had expressly waived presentation of *any* mitigation, and that Landrigan's "statements at sentencing belie his new-found sense of cooperation." (*Id.* at 4.) The judge denied Landrigan's motion for rehearing, and the Arizona Supreme Court denied Landrigan's petition for review from that ruling. (Pet. App. A at 6.)

4. In October of 1996, Landrigan filed a preliminary petition for writ of habeas corpus and application for appointment of counsel, then filed an amended petition on July 31, 1997. The amended petition included a claim that counsel was ineffective at sentencing for not presenting evidence regarding a biological component underlying Landrigan's history of violence. (*Id.* at 6; J.A. at 126-27.)

While the federal habeas petition remained pending, Landrigan filed a successive petition for post-conviction relief in state court, again asserting a claim of ineffective assistance of counsel. As part of the pleadings submitted, Landrigan's counsel included a report prepared by a psychological expert, Mickey McMahon, Ph.D., prior to sentencing.[2] (J.A. at 129.) Landrigan argued that the report should have led counsel to do more investigation and thus was evidence of ineffective assistance. *See* Petition for Post-Conviction Relief, dated Aug. 24, 1999, at 36-37. However, the report, dated July 15, 1990, detailed

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[2] Dr. McMahon interviewed Landrigan, who stated that he and a partner went to the victim's residence to rob him, and when the victim made homosexual advances, Landrigan hit him, then let his partner into the residence. His partner began kicking the victim, and when the victim tried to get up, Landrigan put the victim in a headlock and his partner hit the victim until he was unconscious. Landrigan further stated that he went back to robbing the residence while his partner took an electric cord and choked the victim to death. (J.A. at 135.)

Landrigan's background, including information about his biological parents and adoptive parents and the difficulties Landrigan experienced during childhood. (J.A. at 129-38.) Thus, the report demonstrated that, prior to sentencing, counsel had consulted with an expert and had mitigation-type information that could have been presented had Landrigan permitted counsel to do so.

The trial court denied Landrigan's successive petition for post-conviction relief on September 15, 1999, on the basis of preclusion because the claims could have been raised previously.

On December 15, 1999, the federal district court rejected Landrigan's ineffective assistance of counsel claim and denied his petition. In rejecting the claim, the district court bypassed the deficient performance prong of the *Strickland* analysis[3], and found that Landrigan "failed to demonstrate he was prejudiced by his trial counsel's alleged failure to discover and present mitigation evidence." (Pet. App. C at 22.) After reviewing the evidence Landrigan claimed should have been presented, the district court concluded that Landrigan failed to demonstrate a reasonable probability that the result of the proceeding would have been different. (*Id.*) The district court rejected as unnecessary Landrigan's request for an evidentiary hearing and denied the petition. (*Id.* at 47, 49.)

---

[3] Under *Strickland*, a defendant who challenges his counsel's effectiveness at sentencing must demonstrate (1) deficient performance on the part of counsel, *and* (2) resulting prejudice, that is, a reasonable probability that absent counsel's errors, the sentencer would have imposed a different sentence. 466 U.S. at 687.

Landrigan appealed that ruling to the Ninth Circuit, and a unanimous three-judge panel upheld the district court. (Pet. App. B at 15.) In rejecting Landrigan's ineffective assistance of counsel claim, the panel noted that, under *Strickland*, the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. (*Id.* at 7.) The panel observed that, although there may be close cases in terms of the reasonableness of counsel's actions or inactions in light of the defendant's actions, this was not one of them:

> [O]ur ultimate decision will depend upon the facts and circumstances of the particular case before us. In the constellation of refusals to have mitigating evidence presented, however, this case is surely a bright star. No other case could illuminate the state of the client's mind and the nature of counsel's dilemma quite as brightly as this one. No flashes of insight could be more fulgurous than those which this record supplies.

(*Id.* at 8.) The panel thus concluded that Landrigan failed to establish a basis for relief:

> When Landrigan was facing the possibility that the death penalty would be imposed upon him for the murder of his victim, he prevented the placement of some mitigating evidence before the sentencing judge. In fact, when counsel attempted to cast Landrigan's past history in a somewhat better light, Landrigan was quick to demolish those attempts and make sure that the court saw his past as drear indeed. He left the Arizona courts with the thought that he was minatory and remorseless. *Landrigan I*, 176 Ariz. at 8, 869 P.2d at 118. He does say that he would

> have allowed the presentation of genetic predisposition evidence, but it is not reasonably probable that the outcome would have been affected by that evidence. Perhaps Landrigan now regrets his stance, but we do not sit to palliate regrets. We sit to determine whether there has been error of constitutional magnitude. There has not been.

(*Id.* at 15.)

The Ninth Circuit agreed to consider the case *en banc*, however, and subsequently withdrew the unanimous panel decision. *Landrigan v. Stewart*, 397 F.3d 1235 (9th Cir. 2005). An *en banc* majority reversed, holding that Landrigan had alleged a colorable claim for relief and was entitled to an evidentiary hearing regarding his claim of ineffective assistance of counsel at sentencing. (Pet. App. A at 21.)

The majority concluded that Landrigan had only waived presentation of testimony by two family members, and that he had not waived other mitigation because, "due to his lawyer's meager investigation, there was no other mitigating evidence available to which Landrigan could object or not object." (*Id.* at 15.) The majority further concluded that the Arizona Supreme Court (on direct appeal) and the Arizona Superior Court (on collateral review) incorrectly concluded that Landrigan had waived all mitigation because those courts had taken Landrigan's colloquy with the sentencing judge out of context. (*Id.* at 15-16.)

The majority further ruled that, even overlooking the state post-conviction court's "flawed factual finding that Landrigan unequivocally waived presentation of all

mitigating evidence," the state court's conclusion that Landrigan's claim was frivolous was an unreasonable application of this Court's precedent because the record did not establish that Landrigan's decision to waive mitigation was informed and knowing. (*Id.* at 16-17.)

Two judges dissented, finding that Landrigan failed to allege facts that, if proven, would demonstrate prejudice under *Strickland*. The dissenters noted in particular the majority's acknowledgment that "all the mitigating circumstances Landrigan faults counsel for not raising 'converge' to support the suggestion that he suffers from antisocial personality disorder and cannot control his actions." (*Id.* at 22 n.1.) The dissent concluded that, because Arizona courts have ruled that an antisocial personality disorder diagnosis is not compelling mitigation evidence, Landrigan had not alleged facts that, if proven, would create an objectively reasonable probability of a different sentence. (*Id.* at 27.)

Petitioners sought certiorari review in this Court, which the Court granted on September 26, 2006.

SUMMARY OF ARGUMENT

The Ninth Circuit failed to accord proper deference to the state court's factual findings, as well as the state court's application of this Court's precedent in cases decided under the AEDPA's amendments to 28 U.S.C. § 2254. The Ninth Circuit erred by failing to defer to the state court's factual finding that Landrigan "instructed his attorney not to present any evidence at the sentencing hearing." The Ninth Circuit further erred by finding that the state court's ruling rejecting Landrigan's ineffective

assistance of counsel claim unreasonably applied this Court's *Strickland* jurisprudence.

The Ninth Circuit's conclusion that the state court unreasonably determined the facts by finding that Landrigan waived presentation of mitigation evidence does not survive scrutiny under any standard of review, much less the highly deferential standard under the AEDPA. The state court record includes an on-the-record colloquy between Landrigan and the trial court in which Landrigan affirmed that he had instructed his lawyer not to present evidence of mitigating circumstances. The record further establishes that when Landrigan's trial counsel tried to make a record of the type of evidence he had intended to present in mitigation, Landrigan repeatedly interrupted and actively undermined counsel's efforts to present Landrigan's background in a more favorable light. The evidence fully supports the state court's factual finding that Landrigan affirmatively waived presentation of any mitigation.

The Ninth Circuit further erred by finding that the state court's rejection of Landrigan's ineffective assistance of counsel claim was contrary to, or involved an unreasonable application of, clearly established federal law. The state courts resolved Landrigan's ineffective assistance of counsel claim consistent with decisions from this Court, including *Strickland*, 466 U.S. at 691 (the "reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions"), and *Blystone v. Pennsylvania*, 494 U.S. 299 (1990) (affirming a defendant's right to decide whether to present mitigation evidence in a capital case). Thus, the state court's ruling that Landrigan's express waiver of mitigation renders his ineffective assistance of

counsel claim "frivolous" was not an unreasonable application of clearly established federal law.

ARGUMENTS

I. The Ninth Circuit Exceeded Its Authority Under the AEDPA When It Rejected the State Court's Factual Finding that Landrigan Instructed His Defense Attorney not to Present any Mitigating Evidence.

Under 28 U.S.C. § 2254(d), which codifies the AEDPA amendments to the federal habeas statute, a habeas petitioner must demonstrate that the state court's adjudication of the merits resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts. *See Lockyer v. Andrade*, 538 U.S. 63, 70-73 (2003); *Bell v. Cone*, 535 U.S. 685, 693-95 (2002). Under 28 U.S.C. § 2254(e)(1), factual determinations by a state court are presumed correct, and a habeas petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence.

Even prior to the enactment of the AEDPA, state court factual findings were entitled to a "high measure of deference" requiring that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. "Instead, it must conclude that the state court's findings lacked even 'fair[] support' in the record." *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983). With the enactment of § 2254(e), Congress clarified the

burden of proof the habeas petitioner bears in challenging the state court's factual findings. *See Miller-El v. Cockrell*, 537 U.S. 322, 348 (2003) (habeas petitioner must show that a state court's factual finding was incorrect by clear and convincing evidence, and that the corresponding factual determination was objectively unreasonable in light of the record before the court).

In the instant case, the Ninth Circuit ruled that the state court's finding that Landrigan instructed his defense attorney not to present any mitigating evidence was an "unreasonable determination of the facts." (Pet. App. A at 15-16.) However, the Ninth Circuit failed to accord the deference that should be afforded state court factual findings, and the ruling does not withstand scrutiny.

At the sentencing hearing, the trial court engaged in the following colloquy with Landrigan:

> THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish for him to bring any mitigating circumstances to my attention?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Do you know what that means?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?
>
> THE DEFENDANT: Not as far as I'm concerned.

(Pet. App. A at 14-15; Pet App. D at 3-4.) That colloquy clearly establishes a basis for the state court's finding that "[Landrigan] instructed his defense attorney not to bring any mitigation to the attention of the court." (Pet. App. F at 4.)

The Ninth Circuit nevertheless posits that Landrigan's comments were taken out of context, and that the remainder of the transcript compels the conclusion that Landrigan was saying something other than that he wanted to waive presentation of any potential mitigation evidence. Instead, Landrigan may have wanted only to waive presentation of testimony from family members. (Pet. App. A at 12-16.) However, far from supporting the Ninth Circuit's conclusion, the context of Landrigan's statements confirms that Landrigan was not cooperating with counsel's attempt to develop mitigation and that he did not want *any* mitigating evidence presented, including expert testimony.

Immediately before Landrigan's acknowledgment that he did not wish counsel to present mitigating circumstances, Landrigan's counsel informed the trial court that he had intended to present testimony from Landrigan's natural mother and Landrigan's ex-wife, but that Landrigan had objected. (Pet. App. D at 2-4.) Immediately after Landrigan's express waiver, counsel suggested that the court question the two proposed witnesses to see if they would testify. (*Id.* at 4.) After they stated they would not testify because of Landrigan's wishes, counsel asked for permission to relate what counsel had expected to elicit from the proposed witnesses. The court agreed, and counsel then tried to make a record of information that could be construed to be mitigating. (*Id.* at 5-6.) At that point, as outlined previously,

Landrigan repeatedly interrupted and thwarted counsel's efforts to portray him in a more favorable light. (*Id.* at 5-12.) At one point, Landrigan even stated:

> THE DEFENDANT: Isn't this just hearsay, what is going on here? If I wanted this to be heard, I'd have my wife say it.

(*Id.* at 6.)

After Landrigan's counsel tried to make a record of the information the witnesses would have provided, counsel explained that he had been unable to develop evidence relating to Landrigan's mental health because Landrigan and his family members declined to provide information from which an expert might be able to provide a diagnosis. (*Id.* at 10-12.) Counsel indicated that he was aware of some type of drug use by Landrigan's natural mother during pregnancy, but that he needed additional information regarding what particular drugs had been used and for how long. (*Id.*) Counsel explained that, without that type of information, he would be unable to obtain expert testimony regarding the effect of *in-utero* drug use. (*Id.*) Counsel also indicated that he could have had a psychiatrist or psychologist "standing in the wings to testify." (*Id.* at 12.)

The Ninth Circuit's conclusion that Landrigan only wanted to exclude testimony from his relatives fails because Landrigan objected not only to testimony from his natural mother and his ex-wife, but also to information presented by counsel. Thus, Landrigan's objection to mitigation evidence was not limited to testimony from his family members. Moreover, Landrigan, who was obviously

capable of speaking for himself and had no qualms about addressing the court directly, did not interject at any point to say that his only objection was to testimony from family members.

Furthermore, in the affidavit Landrigan submitted as part of his first state post-conviction proceeding, he avowed only that he would have permitted testimony regarding a biological component to violence in his family. He made no such avowal regarding any other type of mitigating evidence.

The Ninth Circuit exceeded the scope and substance of the limited review available under the AEDPA, and effectively substituted its own unsupported view of the evidence for the fully-supported view of the trial court. Defense counsel's statements and avowals, and those of Landrigan himself, provide a more than ample basis for the trial court's finding that Landrigan sought to exclude consideration of *all* mitigation evidence, and not merely testimony from his family members.

A federal reviewing court does not enjoy the prerogative of rejecting a state court's decision unless that decision rests on an unreasonable determination of the facts. *See Buckner v. Polk*, 453 F.3d 195, 204 n.8 (4th Cir. 2006) (recognizing that, "under the AEDPA, our task is not to decide the credibility issue de novo, but to determine whether [the defendant] has produced clear and convincing evidence that the [state] court's resolution of [credibility assessments underlying the prejudice prong of

the *Strickland* analysis] was incorrect"). Here, the state court's decision denying post-conviction relief rested on a reasonable determination of the facts and has not been rebutted by clear and convincing evidence. Accordingly, the Ninth Circuit erred in its *en banc* opinion by rejecting the state court's finding that Landrigan waived presentation of mitigation evidence.

II. The Ninth Circuit Exceeded Its Authority Under the AEDPA When It Found that the State Court's Ruling was an Unreasonable Application of Clearly Established Federal Law.

The Ninth Circuit failed to accord proper deference under Section 2254(d) to the state court's resolution of Landrigan's ineffective assistance of counsel claim. The Ninth Circuit's conclusion that the state court unreasonably applied *Strickland* is flawed because there is no source in this Court's case law for the proposition that the defendant cannot waive presentation of mitigating evidence, and because there is no precedent from this Court suggesting that the amount of information provided to Landrigan prior to his waiver was inadequate. *See Kane v. Garcia Espitia*, 546 U.S. 9 (2005) (holding that under 28 U.S.C. § 2254(d)(1), clearly established federal law means case law from this Court).

The state court's decision is entirely consistent with this Court's decisions addressing a defendant's right to waive mitigation and with this Court's *Strickland* jurisprudence. The same judge who sentenced Landrigan considered his post-conviction petition and applied *Strickland* in addressing Landrigan's ineffective assistance of counsel claim. (Pet. App. F at 3-4.) In rejecting the claim as "frivolous," the court noted that

"[s]ince defendant instructed his attorney not to present *any* evidence at the sentencing hearing, it is difficult to comprehend how defendant can claim counsel should have presented other evidence at sentencing." (*Id.* at 4, emphasis in original.) The court further noted that Landrigan's assertion in an affidavit that he would have permitted some type of mitigation to be presented was neither credible nor consistent with his statements at sentencing. (*Id.*)

In *Strickland*, this Court held that "the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." 466 U.S. at 691. Reviewing courts must evaluate counsel's conduct in light of "informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* Here, because Landrigan chose not to present mitigation, he cannot establish deficient performance by counsel or resulting prejudice. Accordingly, the state court's resolution of Landrigan's ineffective assistance of counsel claim was not an unreasonable application of *Strickland*. *See Coleman v. Mitchell*, 244 F.3d 533, 544-46 (6th Cir. 2001) (holding that a capital defendant's counsel is not constitutionally ineffective when a competent defendant prevents the investigation and presentation of mitigation evidence).

Contrary to the Ninth Circuit's conclusion, Landrigan's understanding of the nature of mitigation evidence is not at issue. Landrigan's post-conviction affidavit did not avow or even suggest that he did not understand the concept of mitigation. It asserts only that he would have permitted his attorney to present one particular type of mitigation evidence if his attorney had asked him. (Pet. App. E at 2.)

Mitigation evidence is broadly defined. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (noting that the sentencer in a capital case should "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."). Thus, a defendant pursuing post-conviction relief can always identify an additional item of mitigation that his attorney could have investigated and presented. However, identifying additional mitigation evidence does not, without more, establish ineffective assistance. *See, e.g., Buckner,* 453 at 204-05.

When a defendant chooses to waive presentation of mitigation, defense counsel is well-advised to explain mitigation and provide examples of what might constitute mitigation. *See Koon v. Dugger*, 619 So. 2d 246, 250 (Fla. 1993) (announcing prospective rule in Florida requiring that when a defendant refused to present mitigation evidence, counsel must inform the court of the defendant's decision and indicate whether, based on counsel's investigation, counsel reasonably believes there to be mitigating evidence and what that evidence would be). *See also Hawkins v. Mullin*, 291 F.3d 658, 682 (10th Cir. 2002) (noting need to ensure that defendant was apprised of the nature, role, and importance of mitigating evidence, and noting counsel's obligation to undertake an investigation to discover mitigating evidence, or to explain to the defendant why such investigation did not take place). It would be impossible, however, to advise a defendant regarding every conceivable item that could be presented in mitigation.

In the present case, Landrigan's counsel advised the court during the sentencing hearing that he told Landrigan that "in order to effectively represent him, especially concerning the fact that the State is seeking the death penalty, any and all mitigating factors, I was under a duty to disclose those factors to [the court] for consideration regarding the sentencing." (Pet. App. D at 3.) Counsel further noted that he "strongly advised" Landrigan that it was "very much against his interests to take that particular position" when Landrigan resisted efforts to present testimony from family members. (*Id.*) Based on Landrigan's statements during the sentencing hearing, his presence during counsel's discussion with the court, and based on his own affidavit submitted as part of his state post-conviction proceeding, there should be no doubt that Landrigan understood the basic concept of mitigation.

Under *Strickland*, "the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." 466 U.S. at 696. Here, Landrigan's counsel conducted an investigation that was adequate to explain the importance of mitigation to Landrigan. Counsel spoke with Landrigan's relatives about the need to present evidence in mitigation, and they provided him some information that could have been presented in mitigation. Counsel also consulted with a psychological expert, who interviewed Landrigan and prepared a report detailing Landrigan's mental health and family history, including his birth parents' and his adoptive parents' backgrounds and dysfunctional attributes. (J.A. at 129.) The expert's report (which was not submitted to the court at sentencing) noted in

particular that Landrigan's birth father had served time in prison and had a history of physically abusing Landrigan's mother, even trying to kill her on three occasions. Thus, Landrigan's counsel's mitigation investigation was adequate to allow him to advise Landrigan of what type of information could be presented in mitigation, and Landrigan's claim of ineffective assistance of counsel does not implicate the fundamental fairness of the process.

Moreover, as evidenced above, Landrigan's counsel intended to continue his investigation and expressed his frustration with his inability to garner additional information from Landrigan and his family to provide to other mental health experts. At the sentencing hearing, counsel indicated he had considered seeking additional time from the court to develop additional information if Landrigan were to agree to cooperate in developing evidence for consideration by other experts. (Pet. App. D at 11.)

Nothing in the record suggests that the trial court would not have granted additional time if Landrigan had agreed to cooperate. Trial counsel had already developed potential mitigation evidence that could have been presented, and the trial court allowed counsel to make a record of the type of evidence he had hoped to present, and the court expressed its willingness to consider whatever information counsel could put before it. Thus, the blame for limiting mitigation lies not with defense counsel, but with Landrigan himself.

The Ninth Circuit *en banc* opinion cites *Williams v. Taylor*, 529 U.S. 362 (2000), *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Wiggins v. Smith*, 539 U.S. 510 (2003), in concluding that the state court's opinion was contrary to or involved an unreasonable application of clearly

established federal law. (Pet. App. A at 9-10.) However, *none* of those cases involve a situation in which the defendant affirmatively represented to the trial court that he did not want any mitigation evidence to be presented and actively undermined counsel's efforts to present mitigation. Accordingly, the state court's decision denying Landrigan's claim did not contravene clearly established federal law.

The Constitution does not prohibit a defendant in a capital case from waiving presentation of mitigation evidence. *See Blystone*, 494 U.S. at 306 n.4 (affirming death sentence where "[a]fter receiving repeated warnings from the trial judge, and contrary advice from his counsel, petitioner decided not to present any ... mitigating evidence."). *Cf.*, *Wiggins*, 539 U.S. at 533 (noting that *Strickland* does not require defense counsel to present mitigating evidence at sentencing in every case). Thus, the state court's rejection of Landrigan's ineffective assistance of counsel claim, given his express waiver of presentation of mitigation, was consistent with federal law, as set forth in *Strickland* and *Blystone*. Accordingly, the state court's denial of Landrigan's claim was not an unreasonable application of this Court's clearly established law.

Furthermore, the Ninth Circuit's ruling regarding the prejudice prong of the *Strickland* analysis fails to defer to what is essentially a factual finding by the state court. *See Buckner*, 453 F.3d at 204 n.8. By characterizing as "frivolous" Landrigan's assertion that his counsel was ineffective for failing to present evidence of a genetic predisposition to violence, the state court evidenced its disbelief in Landrigan's assertion that he would have permitted counsel to present some other type of proposed mitigation evidence. That factual finding resolves the

prejudice prong of the *Strickland* analysis, because regardless of what counsel could have investigated regarding potential mitigation evidence, Landrigan would not have permitted it to be presented.

Finally, even if Landrigan's express waiver of any mitigation did not resolve the prejudice analysis under *Strickland*, the claim fails because the evidence Landrigan claims should have been presented is only marginally – if at all – mitigating.

The mitigating circumstances Landrigan faults counsel for not raising "converge" to support the suggestion that he suffers from antisocial personality disorder and cannot control his actions. (Pet. App. A at 22 n.1.) A diagnosis of an antisocial personality disorder is not made through a blood test or a genetic screening. The diagnostic criteria, as set forth in the Diagnostic and Statistical Manual of Mental Disorders 706 (American Psychiatric Association, 4th Edition, Text Revision 2000) ("DSM-IV-TR"), are satisfied upon a showing of three or more of the following:

1. failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest
2. deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure
3. impulsivity or failure to plan ahead
4. irritability and aggressiveness, as indicated by repeated physical fights or assaults
5. reckless disregard for safety of self or others

6. consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations

7. lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.

Because an anti-social personality disorder is a description of conduct, the diagnosis itself is not compelling mitigation. Such a diagnosis in fact tends to confirm character traits that are not mitigating.

The Arizona Supreme Court, after citing Landrigan's comments at sentencing, stated: "The best we can say for this defendant is that he was forthright. His comments demonstrate a lack of remorse that unfavorably distinguishes him from other defendants and supports imposition of this severe penalty." (J.A. at 65.) Thus, additional evidence confirming Landrigan's negative character traits would not have been helpful.

The three-judge panel that upheld the district court's ruling correctly concluded that Landrigan's tenuous theory would not have affected the trial judge at sentencing:

> It is highly doubtful that the sentencing court would have been moved by information that Landrigan was a remorseless, violent killer because he was genetically programmed to be violent, as shown by the fact that he comes from a family of violent people, who are killers also.

(Pet. App. B at 11-12.) Moreover, the panel aptly noted that this type of information would have shown the court that Landrigan would continue to be violent:

> He had already done that to a fare-thee-well. The prospect was chilling; before he was 30 years of

> age, Landrigan had murdered one man, repeatedly stabbed another one, escaped from prison, and within two months murdered still another man. As the Arizona Supreme Court so aptly put it when dealing with one of Landrigan's other claims, "[i]n his comments, defendant not only failed to show remorse or offer mitigating evidence, but he flaunted his menacing behavior." *Landrigan I*, 176 Ariz. at 8, 859 P.2d at 118. On this record, assuring the court that genetics made him the way he is could not have been very helpful. There was no prejudice.

(*Id.* at 12.)

The two judges who dissented from the *en banc* ruling agreed with the panel and further noted that, under Arizona law, an antisocial personality disorder diagnosis "has often been treated on appeal as insufficient to justify mitigation," particularly when the defendant is able to control his conduct in other settings. (Pet. App. A at 23 (citing *State v. Brewer*, 826 P.2d 783, 802-03 (Ariz. 1992))). The two dissenting *en banc* judges observed that Landrigan was able to control his impulses long enough to cultivate the victim's trust and attempt to profit from their encounter. Thus, an anti-social personality disorder would not be mitigating in this case. (*Id.*)

The *en banc* majority criticized the dissenters' focus on the proposed antisocial personality disorder diagnosis, noting that "this diagnosis is only a small piece of the puzzle; the crux of Landrigan's argument is that the sentencing judge was never apprised of the full panoply of circumstances that, in the expert's opinion, converged to result in 'disordered behavior [that] was beyond the control of Mr. Landrigan.'" (Pet. App. A, at 20 n.5.)

However, the only claim presented to the state court in Landrigan's post-conviction proceeding was that Landrigan would not have objected to one specific type of mitigating evidence being presented. Landrigan did not assert that he wanted the "full panoply" of mitigation to be presented, and he thus acknowledged that he waived presentation of anything other than evidence of a genetic predisposition to violence/anti-social behavior disorder.

Landrigan has not established either deficient performance or resulting prejudice under *Strickland*. No clearly established law from this Court establishes that counsel performed deficiently under the circumstances or that Landrigan's sentence would have been different had counsel performed differently. The additional evidence that Landrigan claims should have been developed and presented simply confirms that Landrigan is a violent sociopath. Accordingly, the state court's rejection of Landrigan's ineffective assistance of counsel claim was not objectively unreasonable and should be upheld by this Court.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Ninth Circuit and order that Landrigan's federal habeas petition be denied with prejudice.

Respectfully submitted,

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No. 05-1575

IN THE

Supreme Court of the United States

DORA B. SCHIRO, *ET AL.*,
Petitioners,

v.

JEFFREY TIMOTHY LANDRIGAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether the court of appeals erred when it remanded for an evidentiary hearing after concluding that respondent Jeffrey Landrigan, who was denied an evidentiary hearing in state court, had alleged facts in connection with his federal habeas petition that, if proved, would entitle him to relief on his claim that he was denied his Sixth Amendment right to effective assistance of counsel.

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Ariz. R. Crim. P. 32.8(a) 7

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Roger A. Hanson & Henry W.K. Daly, Bureau of Justice Statistics, U.S. Dep't of Justice, *Federal Habeas Corpus Review* (1995) 31

1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice & Procedure* (5th ed. 2005) 31

INTRODUCTION

For page after page, the State's brief tries to convince this Court that the en banc Ninth Circuit violated the provisions of 28 U.S.C. § 2254(d), which limit the extent to which a federal court can grant habeas corpus relief after it has examined state-court rulings on the merits of a federal constitutional claim. But no such questions are involved at the present stage of this case. The Ninth Circuit has not "granted" Landrigan's habeas petition. *See* 28 U.S.C. § 2254(d). The Ninth Circuit's only holding to date is that "Landrigan has demonstrated the proper basis for an evidentiary hearing" on a single claim that he was denied his Sixth Amendment right to effective assistance of counsel. Pet. App. A-21. The appeals court emphasized that it was "not opining on what the district court's ultimate resolution of this issue should be." Pet. App. A-21.

The Ninth Circuit's ruling that Landrigan is entitled to an evidentiary hearing is all that is before this Court. That ruling is unassailable under established law. The Ninth Circuit correctly concluded that Landrigan had not "failed to develop the factual basis" for his ineffective assistance claim in state court within the meaning of 28 U.S.C. § 2254(e)(2) – the only limitation Congress has imposed on evidentiary hearings in federal court – because the Arizona state courts denied Landrigan the opportunity he sought to develop the factual basis for his claim. The Ninth Circuit also correctly held that the facts alleged by Landrigan state a colorable claim for relief, which was all that was required at this preliminary stage of the case. Neither the State's petition for certiorari nor its merits brief (nor, for that matter, its briefs to the Ninth Circuit) advances any argument to the contrary.

As a unanimous Court said in *Michael Williams v. Taylor*, "comity is not served by saying a prisoner 'has failed to develop the factual basis of a claim' where he was unable

to develop his claim in state court despite diligent effort." 529 U.S. 420, 437 (2000). Here, despite Landrigan's diligent effort, he has been denied an evidentiary hearing in both state and federal court to present the evidence he needs to prove his entitlement to relief. There is no justification for concluding that Landrigan's claim should be definitively resolved now without evidentiary development – a step that would severely "diminish the likelihood that [the lower courts] will base their legal decision on an accurate assessment of the facts." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 24 (1992) (Kennedy, J., dissenting).

STATEMENT OF THE CASE

A. Guilt/Innocence Trial

Landrigan was indicted for the 1989 murder of Chester Dean Dyer. Although initially charged with second degree murder, JA 8,[1] Landrigan was subsequently indicted for first degree murder. Dennis M. Farrell of the county public defender's office was assigned as Landrigan's sole attorney. Landrigan's trial was Farrell's first capital case, and his first murder case to go to trial.

Both prior to and during trial, the State offered to allow Landrigan to plead guilty to second degree murder with a stipulated sentence of twenty years in prison. *See, e.g.*, JA 8; Tr. at 13 (June 28, 1990). Landrigan elected to exercise his constitutional right to trial, however, and he was convicted on June 28, 1990.

[1] The index to the Joint Appendix filed by petitioner contains errors. A corrected index is included as an appendix to this brief. Relevant statutory provisions are set out in the Statutory Addendum to this brief.

B. Sentencing

The case proceeded to sentencing before the trial judge under the procedures subsequently held unconstitutional in *Ring v. Arizona*, 536 U.S. 584 (2002). The State filed a sentencing memorandum contending that the death penalty was warranted.

Although the sentencing hearing was originally scheduled for July 31, 1990, Farrell sought and received three separate thirty-day continuances, purportedly to investigate and prepare a mitigation case. On each occasion, Landrigan consented on the record to the continuance, JA 10, 12-13, 15, and on no occasion did Farrell suggest that Landrigan had obstructed efforts to discover or develop mitigation evidence.

One of the three continuances was granted during a hearing on August 24, 1990, at which the court permitted the State to present its case in aggravation. *See* Tr. 3-19 (Aug. 24, 1990). Farrell offered no evidence to rebut the State's aggravation case, though there was a rebuttal case to be made. *See* Pet. App. A-20. The court then asked Farrell whether he wanted to present any part of the mitigation case at that time. He declined, and he stated that he needed more time because he was "still awaiting hospital records." JA 11. Farrell assured the trial court that if he obtained those records he would "be able to proceed at that particular time." JA 12. He was emphatic that "[i]n the presentation of mitigating factors, rather than presenting it piecemeal, I wish to present it all at one time." JA 11. The court asked whether Farrell had a "guesstimate" as to how long that presentation would take; when counsel did not respond, the judge stated that "[t]he Court assumes by your silence that you do not." JA 13.

The hearing on mitigation was ultimately held on October 25, 1990. Six days earlier, Farrell had filed a seventeen-page sentencing memorandum with hospital records attached. *See*

JA 16-52. Only six pages of the memorandum discussed Landrigan specifically, *see* JA 21-26, briefly referencing Landrigan's good conduct while incarcerated and during trial, JA 21; his history of drug and alcohol abuse, JA 21-24; anticipated testimony from Landrigan's mother about her pregnancy, JA 24-25; and the absence of any evidence of premeditation, JA 25-26. The memorandum also included a cursory sentence regarding anticipated testimony "from relatives of the defendant expressing their feelings and love for him," JA 25, and a brief discussion of a difficult family history, drawn almost exclusively from the attached hospital records, JA 24-25.

Farrell had arranged for only two witnesses to testify at the sentencing hearing: Virginia Gipson, Landrigan's birth mother, and Sandra Martinez, his ex-wife. Pet. App. D-2. Neither one testified, however, because, as Farrell explained, Landrigan told them just before the hearing that he did not want them to do so. *See* Pet. App. D-3 (noting that Landrigan did not want testimony "specifically [from] these two people I have here"). At the hearing, Farrell offered no other witnesses and no other evidence.

Following up on Farrell's statement, the sentencing judge asked Landrigan directly about his position. That led to the following colloquy – upon which the State places great emphasis but which no federal judge has ever viewed as decisive:

> THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish for him to bring any mitigating circumstances to my attention?
>
> LANDRIGAN: Yeah.
>
> THE COURT: Do you know what that means?
>
> LANDRIGAN: Yeah.

THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?

LANDRIGAN: Not as far as I'm concerned.

Pet. App. D-3 to D-4.

Later in the hearing the judge, apparently realizing that there would be no evidence regarding Landrigan's mental health, asked Farrell whether he had "considered whether or not a psychological evaluation should be done on your client." Pet. App. D-11. Farrell told the court that he "d[id] not have the information [he] thought necessary for those experts to testify[.]" Pet. App. D-12. He did not inform the court that some months earlier he had obtained a preliminary psychological examination of Landrigan, or that the examining psychologist had proposed a detailed follow-up evaluation to be used in mitigation – a proposal that Farrell never implemented. JA 246-47.

After giving Landrigan a final opportunity to speak and eliciting a graphic response, the judge imposed sentence. Pet. App. D-18 to D-23. She found first that the State had proved two aggravating factors: that Landrigan had two prior felony convictions involving violence, and that the murder was committed for pecuniary gain. Pet. App. D-18. She rejected the State's argument that the murder was committed "in an especially heinous, cruel or depraved manner." Ariz. Rev. Stat. § 13-703(F)(6) (1990); *see* Pet. App. D-19. The judge found no statutory mitigating factors – she specifically noted that she had "received very little information concerning the defendant's difficult family history," Pet. App. D-21 – although she did treat "[l]ove of one's family" and a lack of premeditation as non-statutory mitigating factors. Pet. App. D-21 to D-22. Despite concluding that "the nature of the murder in this case is really not out of the ordinary when one considers first degree

murder," the judge imposed a death sentence. Pet. App. D-23. The Arizona Supreme Court affirmed.

C. State Post-Conviction Proceedings

Landrigan then initiated state post-conviction proceedings, which were held before the same judge who had presided over his trial and had sentenced him to death. As a prelude to filing for relief, Landrigan sought funding for an expert to help develop his claim that trial counsel had provided ineffective assistance at sentencing. JA 70. Landrigan's post-conviction counsel stated that she would need expert assistance to help establish that "substantial mitigating evidence" was not developed or presented at sentencing, including evidence about the effect of Landrigan's in utero exposure to drugs and alcohol. JA 70.

The State opposed on the ground that Landrigan had waived his right to present any mitigation evidence. JA 73. In response, Landrigan maintained that there was "additional evidence not presented to the Court" that "would explain and negate the belief that [he], through his actions, waived the right to present mitigation evidence." Reply to Response to Motion for Appointment of Expert, No. Cr. 90-66, at 1-2 (Ariz. Super. Ct. filed May 24, 1994). Landrigan also contended that "[i]t is fundamentally unfair for the State to argue that Petitioner should not receive the very assistance he needs to avoid an argument from the State that he has failed to establish a colorable claim for relief." *Id.* at 2-3.

Without discussion, the court denied Landrigan's request to appoint an expert. *See* Minute Entry, No. Cr. 90-66 (Ariz. Super. Ct. June 22, 1994)

Landrigan then filed a state post-conviction petition alleging (among other things) that his counsel had provided ineffective assistance at sentencing. *See generally Strickland v. Washington*, 466 U.S. 668 (1984) (defining ineffective

assistance as deficient performance by counsel resulting in prejudice to the defendant). Landrigan requested an evidentiary hearing to "establish his entitlement to relief on this basis," and to provide "a complete and accurate picture of [Landrigan's] background." JA 90-91, 92.[2] The request identified specific witnesses that trial counsel had not interviewed and specific mitigation evidence that trial counsel had not obtained. Landrigan alleged that Farrell had failed to develop mitigating evidence regarding his difficult family background. He noted, for example, that Farrell never contacted his adoptive sister, a registered nurse, who would have testified about Landrigan's behavioral problems. Indeed, Farrell did not interview any member of Landrigan's adoptive family. Nor did he contact Landrigan's birth father, who was on death row in Arkansas. JA 87-88.

Landrigan provided the state court with several affidavits to support his request for an evidentiary hearing and his claim for relief. One affidavit, from his adoptive sister, stated that Landrigan's adoptive mother suffered from alcoholism and that this caused "problems and difficulties in the family during [his] formative years." JA 88, 97. Landrigan also attached evidence that, as a young child, he "had uncontrollable, outbursts of temper, occasionally violent, . . . which continued throughout his childhood and became more frequent as he grew older," and he provided evidence to support his claims of fetal alcohol syndrome. JA 97. He also attached evidence of a long history of violent behavior in his biological family. Pet. App. E-2; *Hill v. State*, 628 S.W.2d 284 (Ark. 1982) (attached as Ex. 7 to Landrigan's petition for post-conviction relief).

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[2] Landrigan's request for a hearing was made pursuant to Ariz. R. Crim. P. 32.8(a), which provides: "The defendant shall be entitled to a hearing to determine issues of material fact, with the right to be present and to subpoena witnesses."

In addition, Landrigan provided context for his alleged "waiver" of the right to present mitigation evidence, including evidence of crises involving family members to whom he was close. He submitted evidence that at the time of the sentencing hearing his adoptive father had recently suffered a life-threatening cardiac aneurism and been confined to a wheelchair; his adoptive mother had suffered a stroke and been moved to a nursing home; and his adoptive maternal grandmother had been diagnosed with fatal leukemia. JA 97-98. These events, he contended, offered at least a "partial explanation" of his remarks at sentencing. JA 88. Landrigan also submitted an affidavit stating he would have cooperated in the submission of various types of mitigating evidence, including his biological mother's "alcohol and drug use during her pregnancy" and his "family history of violence." Pet. App. E-1 to E-2.[3]

The state court denied all relief, without providing an evidentiary hearing. The court expressed skepticism about Landrigan's Sixth Amendment claim, noting that because Landrigan "instructed his attorney not to bring any mitigation to the attention of the court, he cannot now claim counsel was ineffective because [counsel] did not 'explore additional grounds for arguing mitigation evidence.'" Pet. App. F-4. The court arguably rested its decision on other grounds,

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[3] The State points to this affidavit as proof that Landrigan was willing to proceed with only a limited mitigation case focused on the genetic predisposition to violence. *See* Pet'r Br. 17, 21, 27. That assertion is incorrect. The affidavit contains no express statement by Landrigan of any intent to limit the scope of mitigation in this or any other way. Nor does the affidavit purport to set forth the mitigation case in full. In any event, the affidavit itself identifies mitigation evidence ranging beyond a genetic predisposition to violence. Moreover, pursuant to the requirements of Arizona law, Landrigan verified the state post-conviction application (and the affidavits submitted with it), JA 93, which set forth a broad-ranging mitigation case focused on Landrigan's troubled history and emotional and mental problems. JA 78-79.

however, concluding that "[n]otwithstanding the frivolous nature of the claim," Landrigan was procedurally barred from raising it in post-conviction proceedings because he had raised a claim of ineffective assistance of counsel on direct appeal. Pet. App. F-5.[4] The Arizona Supreme Court summarily affirmed.

D. Federal District Court Proceedings

Landrigan then filed an application for a writ of habeas corpus in the United States District Court for the District of Arizona. Landrigan's allegations and supporting evidence detailed the absence of any meaningful investigation by his trial lawyer and described the abundant mitigating evidence that competent counsel could have developed.

1. The Absence of Meaningful Investigation. The materials Landrigan submitted to the district court indicated that Farrell's "investigation" of mitigation evidence did not meet minimally acceptable professional standards. The principal investigation consisted of participating in brief conversations with Landrigan's birth mother and ex-wife, JA 169, and obtaining Landrigan's hospital records.[5] The investigator assigned to work with Farrell, George LaBash, spent a total of thirteen hours on the case. He spent no time developing mitigation evidence because Farrell never instructed him to do so. JA 242-43. LaBash stated that he found the experience of working with Farrell "quite frustrating." JA 242-43. Neither Farrell nor any investigator spoke with any member of Landrigan's adoptive family, JA 188-89, 192, even though Farrell had information that

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[4] The federal district court did not rely on this procedural bar, and the State has disclaimed any reliance on it in this Court. *See* Pet'r Br. 6 n.1.

[5] Landrigan's birth mother, Virginia Gipson, stated that she spent "a total of about two hours" with Farrell, that "she was never asked any questions regarding their family history," and that "she was never interviewed by any investigators before the trial." JA 169.

Landrigan's adoptive mother was an alcoholic and that there may have been problems in the home. *See* JA 244.

Landrigan's submission further revealed that Farrell had arranged for Landrigan to meet with a psychologist, Dr. Mickey McMahon. JA 247. After meeting with Landrigan "to gain a first impression and delineate the necessary next steps to be performed," JA 245, Dr. McMahon identified for Farrell a number of questions that "needed to be checked out" before he could provide a meaningful assessment. JA 245-46. Those questions were never answered because Farrell did not permit Dr. McMahon to "follow up on [his] concerns and observations in the usual and customary manner." JA 246. For instance, Farrell never authorized Dr. McMahon to conduct neuropsychological testing or to "seek information from records or significant others that might also have suggested deficits not typically seen in solely an interview." JA 246. Nor was Dr. McMahon supplied with information by the investigator, or given the opportunity to supply the investigator with information he obtained. JA 246.

Dr. McMahon averred that his "experience with Dennis Farrell was quite different from the working relationship [he] had with counsel in other death penalty cases," JA 247, where counsel and investigators worked with him to ensure that he had the information he needed to complete the psychological evaluation. Dr. McMahon eventually concluded that he "did not want to continue on the case under these conditions," and he wrote an initial report "in the hope that someone would follow up on what [he] had done, [and] even go much further." JA 247.

Although Farrell's own efforts were meager, others gave him promising leads for further investigation. For example, prior to sentencing, Farrell had received not only the report from Dr. McMahon, but also a report from a police detective

summarizing an interview with Landrigan and revealing that Landrigan had long been afflicted by delirium, tremors, and hallucinations. Attachment to State's Response to Motion to Suppress, No. Cr. 90-66, at 3 (Ariz. Super. Ct. filed Mar. 22, 1990). Farrell also had information from a pretrial competency evaluation indicating that Landrigan had a history of psychiatric hospitalization and had periodically suffered from paranoia, probably due to amphetamine abuse. Presentence Investigation, No. Cr. 90-66, at 5 (Ariz. Super. Ct. filed Oct. 26, 1990). Similarly, the hospital records Farrell submitted to the court revealed that in childhood Landrigan was a severe, "black-out" alcoholic and drug addict with no "off" button. And Landrigan's birth mother sent Farrell a letter describing Landrigan's upbringing in an alcoholic home. JA 244. Farrell did not follow up on any of this information, nor did he provide it to Dr. McMahon. JA 242-43, 246.

Finally, the record contains no evidence that Landrigan interfered with or otherwise hindered any investigation. Indeed, Landrigan expressly consented to multiple continuances to allow Farrell to gather mitigation evidence, he allowed Farrell to talk to his mother and ex-wife, he cooperated in the gathering of medical records, and he met willingly with Dr. McMahon.

2. Available Mitigating Evidence. Federal post-conviction counsel developed mitigating evidence that trial counsel failed to discover and that state post-conviction counsel could not develop because the state court denied requests for the appointment of an expert and for an evidentiary hearing.

That evidence included a declaration from Dr. Thomas C. Thompson, a psychologist who compiled a thorough neuropsychological case study of Landrigan. Dr. Thompson based that case study on a neuropsychological examination of

Landrigan, a wealth of medical, educational, criminal, and family background material gathered by federal post-conviction counsel, and extensive interviews with Landrigan's biological father, adoptive sister, ex-wife, and biological daughter, and with Landrigan himself. JA 139-41, 145-60.

Dr. Thompson's review of Landrigan's background revealed a social history "replete with individuals with seriously disordered behavior." JA 153-55. Landrigan's birth father, Darrel Hill, raped Landrigan's birth mother, fifteen-year-old Virginia Gipson (who also happened to be Hill's step-sister). Later they married, and Landrigan was born. JA 164-66. While pregnant with Landrigan, Gipson abused amphetamines, amphetamine-derivative inhalants, and alcohol. JA 155.

Hill, a violent, paranoid drug addict, physically abused Gipson and once held a gun to her head until she passed out. JA 166-67. Hill had a long history of mental illness and spent time in mental hospitals and the mental units of prisons suffering from various afflictions, including "psychosis" and "[s]chizophrenia, paranoid type." *Hill v. Lockhart*, 28 F.3d 832, 836-37 (8th Cir. 1994).

When Landrigan (whose birth name was Billy Patrick Wayne Hill) was only a few months old, Darrel Hill returned to prison and Landrigan was shuffled from one relative to another as Gipson was consumed with her drug habit and struggled to survive. JA 166-68. Finally, when Landrigan was nearly eight months old, Gipson abandoned him, ill with bronchitis and an iron deficiency, at a nursery. JA 197-200. Landrigan was then placed in foster care. JA 208-10.

He was eventually adopted by Nick and Dot Landrigan. JA 181. Dr. Thompson's report noted that Landrigan's adoptive family knew nothing of his background, and Landrigan's "early attachment difficulties were amplified in

his adoptive family as a result of the adoptive mother's affective disturbances and chronic alcoholism." JA 148, 162. His mother routinely consumed a fifth of vodka a day, drinking until she passed out. JA 184. She would frequently slap Landrigan, and she even "hit [him] with a frying pan hard enough to leave a dent." JA 183.

Landrigan's teachers and other acquaintances attested to these circumstances and to his behavioral difficulties. JA 193-95, 216-19, 220-21, 222-24, 225-27, 228-30, 231-36, 237-38. Reared in a chaotic home environment, Landrigan developed severe drug and alcohol problems. JA 132, 217-18, 223, 225-26, 229. In middle school, he blacked out in class and had to be sent to the hospital to have his stomach pumped. JA 237.

One month before his fifteenth birthday, Landrigan was admitted to a hospital psychiatric unit and given psychotropic medication. JA 51, 148. Shortly thereafter, Landrigan was placed in a local boys' home. JA 185; Rule 7 Motion, No. 96-2367 at Ex. 30, at 1 (D. Ariz. filed Nov. 17, 1998). When he was sixteen, he was placed at a correctional facility for juveniles. JA 228; Rule 7 Motion at Ex. 30 at 1. When out of these facilities, Landrigan had frequent run-ins with the police, often for alcohol-related reasons. JA 185; Rule 7 Motion at Ex. 30 at 1. When Landrigan was sixteen, his parents called an ambulance because he would not awaken after a drinking contest. JA 186-87.

In 1980, Landrigan was admitted to a substance abuse treatment center in Austin, Texas. There he met up with Sandy Martinez, a high school friend and fellow drug abuser. They were married in 1981, but within three weeks Landrigan returned to prison to serve time for drug possession. JA 231-32. After he was released from prison, Landrigan and his wife did not work; they drank alcohol and abused drugs. JA 232-33.

Soon thereafter, Landrigan returned to an Oklahoma prison after a conviction for a stabbing following a drunken fight with a friend. JA 234, 229. He escaped and ultimately arrived in Arizona. At the time of the present crime, Landrigan had used amphetamines for forty-two straight days and had slept only about fourteen of those days. JA 133.

3. Requests for Evidentiary Development. Landrigan requested an evidentiary hearing to ensure that the district court would have before it all of the evidence necessary to evaluate his Sixth Amendment claim. In addition to evidence supporting the absence of an effective investigation, Landrigan intended to offer the testimony of Dr. Thompson and others. Dr. Thompson would have explained Landrigan's organic brain dysfunction, which predated the crime; Landrigan's family history; the genetic factors and the in utero exposure to alcohol that contributed to Landrigan's neurobiological dysfunction; and Landrigan's limited ability to assist in his own defense at trial and sentencing. Dr. Thompson would also have offered a more thorough and detailed explanation of Landrigan's brain impairment and its subsequent effects on his behavior. JA 115-23, 125-27.

Landrigan also moved to expand the record, pursuant to Habeas Rule 7, to include a broad array of exhibits, including declarations by experts, individuals with knowledge of the proceedings in state court, members of Landrigan's birth and adoptive families, and a variety of acquaintances. JA 139-95, 216-43, 245-48; *see also* JA 161-62 (depicting family trees). A variety of other records – most of which were in existence at the time of Landrigan's trial – were also included with the motion. *See, e.g.*, JA 196-215, 244, 249-56.

4. The District Court Decision. The district court acknowledged that "[n]o evidentiary hearing was held on the merits of this claim in state court, although [Landrigan] requested an evidentiary hearing on more than one occasion."

It also recognized that "28 U.S.C. § 2254(e)(2) does not prevent the Court from exercising its discretion and granting Petitioner an evidentiary hearing" on his claim. Pet. App. C-46. The court refused to conduct a hearing and ultimately denied relief, however, because it concluded that Landrigan had "not set forth a colorable claim of ineffective assistance of counsel." Pet. App. C-46.

Without deciding whether counsel's performance had been deficient or whether Landrigan had waived the presentation of mitigation evidence, the district court held that Landrigan failed to demonstrate prejudice. In the court's view, the "evidence of [Landrigan's] troubled background, his history of drug and alcohol abuse, and his family's history of criminal behavior" did not create "a reasonable probability that the result of the [sentencing] proceeding would have been different" had the evidence been presented. Pet. App. C-22.

In making that determination, however, the district court considered only a subset of the evidence that Landrigan had presented in mitigation. That was because the district court concluded – erroneously, as the Ninth Circuit later held, *see infra* p. 18 – that consideration of much of Landrigan's mitigation case, including the material relating to fetal alcohol syndrome and mental and organic impairments, was subject to a procedural bar. The court therefore refused to expand the record to allow such evidence to be considered. *See* Pet. App. C-13 to C-18. The district court held, for example, that "[t]he expert testimony [Landrigan] hopes to develop relating to [his] organic brain dysfunction . . . cannot be properly considered by this court" because of procedural default. Pet. App. C-45 to C-46.

E. Ninth Circuit Panel Opinion

A panel of the Ninth Circuit affirmed. Addressing Landrigan's Sixth Amendment claim on the merits, the panel

recognized that the investigation conducted by trial counsel "appears to have been rather asthenic." Pet. App. B-10. It likewise recognized that any purported waiver of the right to present mitigation evidence was not dispositive because there was at least the possibility that a "more thorough" investigation would have given Landrigan "more information from which he could make an intelligent decision about whether he wanted some mitigating evidence presented." Pet. App. B-10. However, focusing only on the evidence that the district court had considered, and ignoring all of the other evidence proffered below, the panel concluded that Landrigan had not met *Strickland*'s prejudice prong because the evidence in question, although mitigating "in some slight sense," would "also have shown the court that it could anticipate that [Landrigan] would continue to be violent." Pet. App. B-12. The panel then concluded – in a footnote and without analysis – that "the district court did not abuse its discretion when it determined that an evidentiary hearing was not required." Pet. App. B-13 n.7.

F. The Ninth Circuit En Banc Opinion

The Ninth Circuit granted Landrigan's petition for en banc review and, in a 9-2 decision, remanded to the district court solely to conduct an evidentiary hearing.[6] Contrary to the State's contentions, the en banc court did not grant relief based on a finding "that the state court unreasonably determined the facts," or on a finding "that the state court's rejection of Landrigan's ineffective assistance of counsel claim was contrary to . . . clearly established federal law." Pet'r Br. 12. Instead, the court concluded that Landrigan was

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[6] Judge Wardlaw joined the panel opinion denying Landrigan relief and also served on the en banc panel. Judge Wardlaw ultimately joined the en banc majority, which, after considering all of the evidence – including the evidence that the district court erroneously excluded – determined that Landrigan was entitled to an evidentiary hearing.

entitled to develop his claim through an evidentiary hearing because he had "made a colorable claim that he did not receive effective assistance of counsel in his sentencing." Pet. App. A-7. The court emphasized that it was "not opining on what the district court's ultimate resolution" of the claim should be. Pet. App. A-21.

In reaching that narrow conclusion, the en banc majority first determined that the limitation on evidentiary hearings set forth in 28 U.S.C. § 2254(e)(2) did not foreclose a hearing here. Landrigan had requested both an appointment of an expert and an evidentiary hearing in state court to develop his Sixth Amendment claim, and the state court had denied those requests. Pet. App. A-8, A-9. Because Landrigan had "tried and failed, through no fault of his own, to develop the facts supporting his ineffectiveness claim at the state-court level," § 2254(e)(2) did not bar a hearing on his federal habeas claim. Pet. App. A-9 (applying *Michael Williams v. Taylor*, 529 U.S. 420 (2000)).

The court then considered whether Landrigan had alleged a "colorable claim" under *Strickland*. All eleven members of the en banc court concluded that Landrigan had presented a colorable claim that his counsel's performance had been deficient. *See* Pet. App. A-12 (majority opinion) (expressing "grave doubts whether Landrigan received effective assistance of counsel"); Pet. App. A-22 (Bea, J., dissenting) ("agree[ing] with the majority's conclusion that counsel's limited investigation fell below the standards of professional representation prevailing in 1990"). As the majority noted, based upon the existing record, "it appears that counsel did little to prepare for the sentencing aspect of the case." Pet. App. A-10. Moreover, despite his lack of effort, trial counsel had been told about "potential mitigating evidence, but that evidence was not developed." Pet. App. A-11. Particularly in light of Landrigan's "alleg[ations] that with some minimal

investigation, [trial counsel] could have uncovered Landrigan's tortured family history," Landrigan's claim of deficient performance was at least colorable. Pet. App. A-11 to A-12, A-17.

The Ninth Circuit likewise concluded – without dissent – that Landrigan's purported "waiver" of his right to present mitigation evidence did not foreclose his Sixth Amendment claim. First, nothing in the record before the court indicated that Landrigan's statement, even if read as a broad waiver, was knowing and intelligent, particularly in light of counsel's failure to develop the mitigation evidence necessary to allow Landrigan to make an informed decision. Pet. App. A-16. And second, any reading of Landrigan's waiver as extending beyond the presentation of testimony from his mother and ex-wife "is not supported by the record." Pet. App. A-15 to A-16.

The court of appeals then addressed prejudice. The majority held at the outset that the district court had erred in excluding "additional facts proffered by Landrigan" on the ground of procedural bar. Pet. App. A-18 to A-19. With that error corrected, the court noted that the record as a whole revealed "a significant amount of potential mitigating evidence that was not unearthed or presented to the sentencing judge." Pet. App. A-19 (describing evidence). Considering both the mitigating evidence adduced at trial and *all* of the evidence alleged in the habeas proceedings, the majority then concluded that Landrigan's allegations, "[i]f true, . . . are the very sort of mitigating evidence that might well have influenced the [judge's] appraisal of [Landrigan's] moral culpability." Pet. App. A-19 (internal quotation marks omitted). Thus, there was a "reasonable probability" that a

factfinder, presented with all of the evidence, would have reached a different conclusion. Pet. App. A-21.[7]

SUMMARY OF ARGUMENT

The Ninth Circuit's holding that Landrigan "has demonstrated a proper basis for an evidentiary hearing" on his Sixth Amendment claim, Pet. App. A-21, is correct and should be affirmed.

In its present posture, this case presents no issue relating to the limitations imposed on federal habeas corpus proceedings by 28 U.S.C. § 2254(d). That provision governs the ultimate question whether a federal habeas court should grant relief. The threshold question whether to afford a habeas petitioner an evidentiary hearing – the question here – is governed by different standards that are quite straightforward. The petitioner must demonstrate that he did not "fail[] to develop the factual basis of his claim" in the state courts, 28 U.S.C. § 2254(e)(2),[8] and must allege facts which, if proved, would entitle him to relief.

Landrigan easily meets those requirements. As the en banc Ninth Circuit held – and the State effectively concedes – § 2254(e)(2) does not preclude a hearing because Landrigan diligently sought, and was denied, the opportunity to make his factual case in state post-conviction proceedings. *See Michael Williams v. Taylor*, 529 U.S. at 432, 435-37.

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[7] Judges Bea and Callahan dissented. In their view, the new mitigation evidence proffered by Landrigan did not suffice to show a reasonable probability that the sentencing decision would have been different. Pet. App. A-22 to A-27.

[8] A habeas petitioner who has "failed to develop" the factual basis for the claims asserted in the petition can still obtain an evidentiary hearing in federal court upon meeting the stringent additional requirements set forth in § 2254(e)(2). Those requirements are not at issue in this case.

Similarly, Landrigan has pled a colorable Sixth Amendment claim under the well-established *Strickland* standard. All members of the Ninth Circuit en banc court agreed that Landrigan has alleged facts that, if proven, would establish his trial counsel's deficient performance under *Strickland*. Trial counsel undertook virtually no effort to develop a mitigation case. He failed to prepare a comprehensive psychological evaluation and social history, failed to interview family members, and ignored numerous promising leads suggesting the existence of a powerful mitigation case. *See Wiggins v. Smith*, 539 U.S. 510 (2003). Landrigan has likewise alleged a colorable claim of prejudice. The powerful mitigating evidence developed by federal post-conviction counsel – evidence of a troubled history and serious emotional and mental problems – is precisely the kind of evidence that is most relevant to assessing a defendant's moral culpability at sentencing. *Wiggins*, 539 U.S. at 535; *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989).

Contrary to the State's contention, Landrigan cannot be denied an evidentiary hearing based on any purported "waiver" of his right to present mitigation evidence at the sentencing hearing. Landrigan has set forth a colorable claim that any such "waiver" was itself the direct result of trial counsel's deficient performance. Even apart from counsel's deficient performance, Landrigan has alleged that any purported waiver was not knowing and intelligent, and that he intended at most to forgo his right to put on his ex-wife and birth mother as witnesses. If Landrigan can prove his allegations, then his comments at sentencing will pose no bar to relief.

At bottom, the State is asking this Court to conclusively deny Landrigan's claim without granting him any opportunity to prove facts that would entitle him to relief.

Such a result cannot be squared with the choices Congress made in § 2254, with this Court's decision in *Michael Williams*, or with the bedrock principle that where a habeas petitioner sets forth a colorable claim to relief, "'it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.'" *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) (Rehnquist, C.J.), (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)). In particular, nothing in § 2254(d) supports the State's effort to pretermit consideration of Landrigan's claim. Until Landrigan has been afforded an evidentiary hearing, it is impossible to know how, or even if, the deferential standards set forth in that provision will apply to Landrigan's claim. And even if they do apply, "[d]eference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("*Miller-El I*"). As this Court has stressed, "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review." *Id.*

Thus, the right result in this case is for the evidentiary hearing ordered by the Ninth Circuit to proceed. At that hearing, Landrigan's allegations can be put to the test, and the district court can make a reliable determination respecting Landrigan's Sixth Amendment claim. It would be manifestly unjust – as well as contrary to every applicable legal principle – to deny Landrigan the opportunity he was denied in state court to prove his entitlement to relief.

ARGUMENT

I. The Only Question Before This Court Is Whether the En Banc Ninth Circuit Erred in Granting Landrigan an Evidentiary Hearing.

Treating the decision below as a final judgment on the merits, the State devotes its entire brief to contending that the Ninth Circuit applied § 2254(d) incorrectly because the en banc court of appeals was insufficiently deferential to the state court decision rejecting Landrigan's claim. That argument is misdirected. Section 2254(d) prescribes standards for determining when a federal habeas application can "be granted." 28 U.S.C. § 2254(d). At this early stage in the proceedings, the Ninth Circuit has not "granted" relief on any claim in Landrigan's application; it has not instructed the district court to grant relief on any claim in Landrigan's application; and it has not determined that any claim in Landrigan's application warrants a grant of relief.

In the judgment under review, the Ninth Circuit simply took the preliminary step of remanding for an evidentiary hearing. The court did so to ensure that the merits of the Sixth Amendment claim will not be decided without a factual record that permits a reliable determination (under the appropriate standard for granting relief) of whether Landrigan's trial counsel performed below minimally acceptable levels, whether that performance prejudiced Landrigan, and what effect, if any, Landrigan's colloquy at the sentencing hearing has on his claim. These are intensely factual issues, and the record with respect to each of them is incomplete. The Ninth Circuit thus appropriately insisted on further evidentiary development.

In ordering a hearing, the Ninth Circuit scrupulously followed the governing law. The source of an affirmative right to an evidentiary hearing is 28 U.S.C. § 2243, which provides that "[w]hen the writ or order is returned a day shall

be set for hearing" and "[t]he court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." *Id.*; *see also* Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules") (providing that "[i]f the petition is not dismissed, the judge must review the answer, any transcripts and records of prior proceedings, and any materials submitted to determine whether an evidentiary hearing is warranted," and must conduct any hearing with "regard for the need of counsel for both parties for adequate time for investigation and preparation"). This Court has explicated the standard for granting such a hearing in *Townsend v. Sain*, 372 U.S. 293 (1963), and other decisions. In 1996, Congress placed certain express statutory limits on the availability of federal evidentiary hearings where the petitioner has "failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). Congress did not otherwise alter the law governing evidentiary hearings. Subject only to the limitations of § 2254(e)(2), the standard articulated in this Court's decisions continues to govern.

In this case, the Ninth Circuit first analyzed § 2254(e)(2) and determined that it did not forbid an evidentiary hearing for Landrigan, because he had been denied the opportunity to develop the factual basis of his claim in state court. The Ninth Circuit then applied the test set forth in this Court's cases and determined that Landrigan "alleged facts that, if demonstrated to be true, present a colorable claim that he received ineffective assistance of counsel in his capital sentencing proceeding." Pet. App. A-21.

As will be shown below, the court's decision to order an evidentiary hearing is unimpeachable. Indeed, the Ninth Circuit's decision is consistent not only with the specific standards governing habeas corpus but also with the general principle that a federal court should inform itself reliably

about the facts it needs to make a responsible decision on constitutional questions. *See, e.g.*, *Polk Co. v. Glover*, 305 U.S. 5, 10 (1938); *see also Tamayo-Reyes*, 504 U.S. at 24 (Kennedy, J., dissenting) ("We ought not to take steps which diminish the likelihood that [federal] courts will base their legal decision on an accurate assessment of the facts.").

In seeking to bypass this factual development and obtain a definitive ruling from this Court on the ultimate merits of Landrigan's Sixth Amendment claim, the State's arguments are precipitate. The State seeks to blur the distinction between the threshold inquiry into whether Landrigan is entitled to further process and the ultimate merits inquiry into whether Landrigan is entitled to relief, an inquiry that cannot be carried out until the requisite process is complete. In this respect, the present case parallels *Miller-El v. Cockrell*, 537 U.S. 322 (2003). There, the state contended that the court of appeals had properly denied a certificate of appealability (*see* 28 U.S.C. § 2253(c)) on Miller-El's challenge to the prosecution's use of race-based peremptory challenges, because Miller-El ultimately would "not be able to satisfy his burden" under § 2254(d) and § 2254(e)(1) of overturning the state court's credibility findings respecting the prosecution's motives. 537 U.S. at 348. Reversing, this Court held that the decision whether to issue a certificate of appealability "is not the occasion for a ruling on the merit of petitioner's claim." *Id.* at 331. Because Miller-El readily met the applicable threshold test, his appeal was allowed to proceed. *See id.* at 327 (granting certificate of appealability because "jurists of reason could . . . conclude the issues presented are adequate to deserve encouragement to proceed further").

Analogous reasoning applies here. At this preliminary stage, the question is not whether Landrigan's Sixth Amendment claim warrants relief under the appropriate standard of review. The only question now is whether the

Ninth Circuit overstepped any rule of habeas corpus practice or propriety in concluding that Landrigan should be given "careful consideration and plenary processing of [his claim,] including full opportunity for presentation of the relevant facts," *Blackledge v. Allison*, 431 U.S. 63, 82-83 (1977) (quoting *Harris*, 394 U.S. at 298) (internal quotation marks omitted), before the district court or the court of appeals decides the merits of the Sixth Amendment issue presented but unclearly delineated by a record that the state courts prevented Landrigan from developing. On that question, the State's brief is silent, offering no reason for overturning the Ninth Circuit's decision.

II. The Ninth Circuit Correctly Held that Landrigan Should Receive an Evidentiary Hearing.

A. Section 2254(e)(2) Permits an Evidentiary Hearing in Landrigan's Case.

Section 2254(e)(2) does not bar an evidentiary hearing in this case. That provision restricts the availability of a hearing only where "the applicant has failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. § 2254(e)(2). In *Michael Williams v. Taylor*, 529 U.S. 420 (2000), the Court unanimously held that "[u]nder the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." *Id.* at 432. The existence of "[d]iligence . . . depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court," and "will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." *Id.* at 435, 437.

Here, as the en banc Ninth Circuit held in a careful application of *Michael Williams*, Landrigan's post-conviction

counsel displayed the requisite diligence by investigating the Sixth Amendment claim and seeking expert assistance and an evidentiary hearing in the state courts. Pet. App. A-8. Landrigan therefore cannot be said to have "failed to develop the factual basis" of his claim. The State did not contend otherwise in its petition for certiorari or its opening brief in this Court. Nor did the State argue to the Ninth Circuit that § 2254(e)(2) precluded an evidentiary hearing in Landrigan's case. Accordingly, § 2254(e)(2) cannot be a ground for reversal.

B. Under the "Colorable Claim" Standard, Landrigan Is Entitled to an Evidentiary Hearing if He Can Show that Further Evidentiary Development Might Affect the Resolution of His Claim.

Because Landrigan did not have the opportunity for factual development in State court despite his diligence, he is entitled to a federal evidentiary hearing if he has stated a "colorable claim." *See* Pet. App. A-21 (applying standard). Like other courts of appeals, the Ninth Circuit uses "colorable claim" as shorthand for the standard set forth in this Court's decisions: whether the habeas applicant has alleged facts which, if proved, would entitle him to relief. *See* Habeas Rule 8 Advisory Committee Notes (discussing standard); *Hill v. Lockhart*, 474 U.S. 52, 62-63 (1985) (White, J., concurring); *Townsend*, 372 U.S. at 312.[9] This

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[9] In setting forth circumstances in which a federal hearing was mandatory, *Townsend* required that the petitioner not only allege a colorable claim, but also make any one of six showings, one of which was that "the material facts were not adequately developed at the state-court hearing." 372 U.S. at 313. A sharply divided Court modified the standard in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), to mandate an evidentiary hearing in this circumstance only if the habeas petitioner could show "cause" (in the sense that the failure to develop the facts in the state proceedings was not attributable to the petitioner). *Id.* at 11.

standard implements the well-established principle that "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) (Rehnquist, C.J.) (quoting *Harris*, 394 U.S. at 300).

The essential question is whether an evidentiary hearing is needed to ensure that a properly informed decision will be made on the constitutional issues presented in a habeas petition, where the facts necessary to frame and resolve those issues have not been developed in the state courts, through no fault of the petitioner. There is such a need when a habeas petition and the state court record put material facts in issue that cannot be adjudicated without additional factual development and presentation. *See, e.g.*, *Michael Williams*, 529 U.S. at 444-45; *Blackledge*, 431 U.S. at 75-78, 82-83 (holding that a federal habeas petition could not be dismissed without fact development and adjudication when its allegations "were not in themselves so 'vague [or] conclusory,'" "so 'palpably incredible,' . . . [or] so 'patently frivolous or false' . . . as to warrant summary dismissal," and explaining that, having made a colorable claim, the petitioner was "'entitled to careful consideration and plenary processing of [his claim,] including full opportunity for presentation of the relevant facts'"); *Machibroda v. United States*, 368 U.S. 487, 492-96 (1962); *Tamayo-Reyes*, 504 U.S. at 23-24 (Kennedy, J., dissenting) (stressing the need for a pragmatic inquiry into whether "an evidentiary hearing will make a difference in the outcome").

When Congress enacted AEDPA in 1996, it codified in § 2254(e)(2) the "cause" component of the *Tamayo-Reyes* standard. *See Michael Williams*, 529 U.S. at 434. As discussed above, Landrigan has demonstrated the requisite diligence to avoid the § 2254(e)(2) restriction.

This standard is reflected in a long line of this Court's cases. Notably, like Landrigan, the habeas petitioners in many of these cases sought a federal evidentiary hearing to substantiate allegations that an apparent waiver of their fundamental rights was invalid or did not otherwise bar relief – and this Court affirmed their right to further proceedings on that issue. *See, e.g.*, *Blackledge*, 431 U.S. at 75-78, 82-83 (permitting a claim of improper inducement of a guilty plea to proceed despite petitioner's representation to the state court at the time of the plea that the plea was voluntary and understanding); *Fontaine v. United States*, 411 U.S. 213, 215 (1973) (ordering a hearing on post-conviction claims that the petitioner's confession, waiver of counsel, and guilty plea were the product of coercion, despite a plea colloquy in which he had stated that these were voluntary and understanding and that he was factually guilty; procedures such as plea colloquies are intended "to flush out and resolve all such issues, but like any procedural mechanism, . . . [their] exercise is neither always perfect nor uniformly invulnerable to subsequent challenge calling for an opportunity to prove the allegations"); *Boyd v. Dutton*, 405 U.S. 1, 3 (1972) (ordering a hearing on whether the "petitioner knowingly and voluntarily waived his constitutional right to counsel before entering a guilty plea in the state trial court"); *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 120-21 (1956) (explaining that "[t]he allegations as to petitioner's treatment prior to confession and his understanding of the nature and consequences of a guilty plea present the very kind of dispute which should be decided only after a hearing," even though "the trial record shows that petitioner told the judge that he was guilty and said 'I throw myself at the mercy of the court'"); *United States ex rel. McCann v. Adams*, 320 U.S. 220, 221 (1943) (per curiam) ("[T]he relator filed a petition for a writ of habeas corpus in the District Court which, with supporting

affidavits, adequately raised the issue whether in fact he intelligently – with full knowledge of his rights and capacity to understand them – waived his right to the assistance of counsel and to trial by jury. . . . It is a claim which the relator should be allowed to establish, if he can. We cannot say that, in the light of the supporting affidavits, the petition for a writ of habeas corpus was palpably unmeritorious, and should have been dismissed without more.").[10]

Although the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") altered the standards for obtaining an evidentiary hearing in other respects (in § 2254(e)(2)), nothing in AEDPA modified this well-established case law. Congress did not impose restrictions other than those in § 2254(e)(2) on the power of a federal habeas court to order a hearing, and Congress has never changed the longstanding colorable claim standard. Accordingly, that standard continues to govern. *See, e.g., Astoria Fed. Sav. & Loan*

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[10] *See Blackledge*, 431 U.S. at 74 n.4 (relying on *Fontaine* and *McCann* in interpreting § 2254); *see also, e.g., Humphrey v. Cady*, 405 U.S. 504, 517 (1972) (holding that petitioner's claim that he did not knowingly and intelligently waive his rights required an evidentiary hearing); *Walker v. Johnston*, 312 U.S. 275, 284-87 (1941) (explaining "that if the petition, the return, and the traverse raise substantial issues of fact it is the petitioner's right to have those issues heard and determined" at a hearing, and that the pleadings did raise a "material issue of fact" where petitioner alleged that he did not "knowingly waive" his right to counsel, even though the government contended that his allegations were improbable); *Waley v. Johnston*, 316 U.S. 101, 102-05 (1942) (per curiam) (requiring a hearing because "[i]f the allegations are found to be true, petitioner's constitutional rights were infringed" on the ground that his guilty plea was coerced). *See generally Vasquez v. Hillery*, 474 U.S. 254, 258 (1986); *Procunier v. Atchley*, 400 U.S. 446, 451 (1971); *Townsend*, 372 U.S. at 312; *Mattox v. Sacks*, 369 U.S. 656, 657 (1962); *Massey v. Moore*, 348 U.S. 105, 106-09 (1954) ("On the present pleadings we must take as true the allegation of mental incapacity at the time of the trial. . . . We do not intimate an opinion on the merits, for we do not know what facts the hearing will produce.").

Ass'n v. Solimino, 501 U.S. 104, 108 (1991); *United States v. Texas*, 507 U.S. 529, 534 (1993); *see also J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 142 (2001).[11]

To be sure, § 2254(e)(1) may influence the standard of proof a habeas petitioner must meet at an evidentiary hearing, and § 2254(d) may limit the habeas court's power to grant relief after the evidence has been received and evaluated. But the appropriate inquiry at the Habeas Rule 8 stage remains a threshold one. As this Court made clear in *Michael Williams*, a petitioner who has been denied the opportunity to make a state court record as to a constitutional claim, despite any lack of diligence or other fault, should be given a federal evidentiary hearing – his *first and only* chance to develop and prove the relevant facts – if the underlying claim is potentially viable. *See Michael Williams*, 529 U.S. at 442 (allegations that juror and counsel failed to reveal relationship to each other and to prosecution witness "disclose the need for an evidentiary hearing," since "[i]t may be that petitioner could establish that [the juror] was not impartial . . . or that [counsel's] silence so infected the trial as to deny due process"). Sections 2254(d) and (e)(1) are relevant, to the extent that the record following an evidentiary hearing indicates they are applicable at all, only in that they inform the post-hearing determination whether a petitioner is entitled to relief on the merits. If the allegations are sufficient to establish the potential for such entitlement, then there is "a realistic possibility that an evidentiary

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[11] The courts of appeals continue to grant evidentiary hearings where a petitioner has pled facts that, if proven, would entitle him to relief, in cases in which § 2254(e)(2) does not otherwise bar an evidentiary hearing. *See, e.g., Barkell v. Crouse*, 468 F.3d 684, 696-98 (10th Cir. 2006); *Fullwood v. Lee*, 290 F.3d 663, 680-82 (4th Cir. 2002); *Matheney v. Anderson*, 253 F.3d 1025, 1039 (7th Cir. 2001).

hearing will make a difference in the outcome." *Tamayo-Reyes*, 504 U.S. at 24 (Kennedy, J., dissenting); *see also Townsend*, 372 U.S. at 322; *cf. Miller-El I*, 537 U.S. at 327 (cautioning against an overly rigorous threshold inquiry in the COA context and asking whether "jurists of reason could . . . conclude the issues presented are adequate to deserve encouragement to proceed further").

The "colorable claim" standard embodies a recognition that evidentiary hearings can make a critical difference in the discrete circumstances in which they are appropriate.[12] Incarcerated petitioners are obviously hampered in their ability to investigate the facts. And discovery in § 2254 proceedings is not available as a matter of course (as it would be in most civil cases). *See Bracy*, 520 U.S. at 904; *Harris v. Nelson*, 394 U.S. 286, 300 (1969). Typically, no discovery is permitted until entitlement to an evidentiary hearing has itself been established. *See, e.g.*, Habeas Rule 6 Advisory Committee Notes. Accordingly, the hearing is not simply a matter of parading previously examined witnesses before the habeas court. Rather, subpoenaed witnesses may well present their evidence in a surprisingly powerful (or weak)

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[12] Evidentiary hearings can serve to air otherwise concealed facts that vindicate federal constitutional claims (*see, e.g., Banks v. Dretke*, 540 U.S. 668 (2004)), or definitively scupper them (*see, e.g., McKleskey v. Zant*, 499 U.S. 467 (1991)). Notably, however, few federal habeas cases actually merit an evidentiary hearing. Typically, a petition is dismissed as insubstantial on its face (*see* Habeas Rule 4), or a prisoner has already received an evidentiary hearing in state court or has forfeited any entitlement to a hearing pursuant to § 2254(e)(2). *See* 1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice & Procedure* 35 n.26, 887 n.3 (5th ed. 2005) (reporting that pre-AEDPA statistics show that "district courts hold [evidentiary] hearings in only 1.17% of all habeas corpus cases"); Roger A. Hanson & Henry W.K. Daly, Bureau of Justice Statistics, U.S. Dep't of Justice, *Federal Habeas Corpus Review* 17 (1995) (stating that 63% of issues raised by habeas petitioners in pre-AEDPA cases in the courts studied were dismissed).

fashion, or come forward with helpful information that could not have been developed previously.

Where a habeas petitioner asserts a denial of the Sixth Amendment right to effective assistance of counsel under the *Strickland* standard, the need for evidentiary development can be particularly acute. Most of the relevant evidence will typically relate to "occurrences outside the courtroom" upon which the trial record "could ... cast no real light." *Machibroda*, 368 U.S. at 494-95. In particular, an evidentiary hearing may be the first time that trial counsel – whose conduct is necessarily impugned by the constitutional claim presented, and whose testimony is usually critical – will be heard from at all, let alone cross-examined. In addition, the *quality* of witnesses' testimony – their demeanor, their credibility, the impact of what they say – is especially important in making the sensitive, fact-specific determination whether there is a reasonable probability that the presentation of the evidence in the first instance would have averted the imposition of the death penalty. *See, e.g.*, *Wingo v. Wedding*, 418 U.S. 461, 474 (1974). As Justice Kennedy observed for a unanimous Court in *Massaro v. United States*, 538 U.S. 500 (2003), the "trial record [is] not developed precisely for the object of litigating or preserving" an ineffective assistance claim and is "thus often incomplete or inadequate for this purpose. . . . Without additional factual development, moreover, an appellate court may not be able to ascertain whether the alleged error was prejudicial." *Id.* at 504-05.

C. Landrigan Has Advanced a Colorable Claim of Ineffective Assistance of Counsel.

Landrigan has pleaded a colorable claim for relief that cannot be resolved solely on the basis of the state court record. He asserts that he was denied his Sixth Amendment right to effective assistance of counsel under the clearly

established law of *Strickland v. Washington*, 466 U.S. 668 (1984). *See also Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Terry Williams v. Taylor*, 529 U.S. 362 (2000). Under *Strickland*, a criminal defendant establishes an entitlement to relief by proving that trial counsel's performance "fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 688, and by showing a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

The facts alleged and the limited evidence adduced thus far support the conclusion that Landrigan's trial counsel put minimal effort into investigating possible avenues of mitigation, ignored obvious clues pointing to sources of mitigating evidence, and ultimately had ready only a paltry mitigation case consisting of testimony from Landrigan's mother and ex-wife. *See Wiggins*, 539 U.S. at 523-26. The facts alleged and the limited evidence adduced thus far also support Landrigan's contention that there is, at a minimum, a reasonable probability the outcome at sentencing would have been different had competent counsel prepared and presented the available but undeveloped mitigation evidence. *See Terry Williams*, 529 U.S. at 393-96. As the en banc Ninth Circuit held, the allegations and evidence presented thus far are of exactly the kind that could influence a sentencer to impose a sentence of life imprisonment rather than death. Pet. App. A-19.

In the same vein, the allegations and evidence presented thus far support the conclusion that Landrigan did not validly waive his right to present mitigation evidence. As the court of appeals indicated, the transcript of the colloquy between Landrigan and the state trial judge (which is the sole "evidence" on which the State's waiver argument rests) does not document a knowing and intelligent waiver of

Landrigan's right to put on mitigation evidence, or even establish what Landrigan thought he was giving up. There can be no reliable determination that this colloquy effected a valid waiver without knowing what Landrigan's trial counsel had actually done to prepare a mitigation case, what Landrigan's trial counsel had told him about the nature of the proceedings and the evidence and arguments he would be forgoing if he did not put on a mitigation case, and what Landrigan understood and intended to communicate in response to the trial judge's questions. The present record does not contain anything approaching informative answers to those questions – all of which (at a minimum) must be answered before a reliable final determination can be made respecting the effect of Landrigan's statements during the colloquy.

The State's principal response is that § 2254(d) bars Landrigan from obtaining relief. Yet it is far from clear whether that provision will apply *at all* to the ultimate resolution of Landrigan's substantive Sixth Amendment claim. In any event, § 2254(d) and (e)(1) provide no basis for denying Landrigan an evidentiary hearing at this juncture, even if they will ultimately apply to his ineffective assistance claim. As this Court has made clear, "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review." *Miller-El I*, 537 U.S. at 340. Likewise, "[d]eference does not by definition preclude relief." *Id.* Thus, even where AEDPA applies, "[a] federal court can disagree" with a state court's determination and "conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Id.* No aspect of the state court's decision on Landrigan's Sixth Amendment claim can be given dispositive effect at this stage. If Landrigan can prove his allegations to the satisfaction of the federal habeas court under the appropriate standard, he will be entitled to relief. Because he was denied

the opportunity to develop the factual basis of his claim in the state courts, the Ninth Circuit correctly ruled that he should be given that opportunity in federal court.[13]

1. Trial Counsel's Deficient Performance.

Further evidentiary development is warranted to determine whether the performance of Landrigan's trial counsel was deficient. As both the majority and the dissent in the en banc Ninth Circuit recognized, the present incomplete record strongly suggests that Landrigan's trial counsel failed to conduct a minimally adequate investigation prior to sentencing. Pet. App. A-10, A-12 (statement by the

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[13] The potential applicability of § 2254(d) to the several issues bearing on Landrigan's Sixth Amendment claim – (a) substandard performance, (b) prejudice under *Strickland*, and (c) the State's contention of "waiver" – cannot be untangled or resolved before the hearing ordered by the court of appeals has further developed the facts bearing on all of these issues and their interrelationships. Depending on the course of the evidentiary hearing, it is certainly possible that § 2254(d) will not apply at all, or will apply only in a limited way. *See generally Holland v. Jackson*, 542 U.S. 649, 653 (2004) (per curiam) (noting that, where "new evidence" is presented in a federal evidentiary hearing, de novo review may be proper under "the theory that there is no relevant state-court determination to which one could defer"); *Terry Williams*, 529 U.S. at 394-96 (reviewing deficient performance under *Strickland* de novo because the state court did not decide the issue); *Wiggins*, 539 U.S. at 534 (reviewing prejudice under *Strickland* de novo because the state court did not decide the issue); En Banc Ninth Cir. Oral Argument, No. 00-99011, *available at* http://www.ca9.uscourts.gov/ca9/media.nsf/Media+Search?OpenForm&Seq=1 ("Ninth Cir. Oral Argument Audio") at 43:55-44:30 (State's concession that there were no state court findings about whether Landrigan would have cooperated with a broader investigation); *id.* at 50:30-51:20 (State's concession that there were no state court findings about whether Landrigan's proffered mitigation evidence had merit: "You're right. There's not an express statement addressing each of the merits . . . ."). This Court need not and should not decide these issues now. Rather, they should be decided after the factual record has been fully developed.

majority that "it appears that Landrigan's counsel did little to prepare for the sentencing aspect of the case"); Pet. App. A-22 (statement by the dissenters that they "agree[d] . . . that counsel's limited investigation of Landrigan's background fell below the standards of professional representation prevailing in 1990"). Landrigan's district court pleadings and supporting affidavits assert that trial counsel "did not contact Landrigan's birth father, secure a detailed mental health evaluation, or develop a family or social history regarding Landrigan's upbringing in his adoptive home." Pet. App. A-11. Indeed, the sentencing judge herself noted that she had "received very little information concerning the defendant's difficult family history." Pet. App. D-21.

What little trial counsel did appears to have been slipshod. For example, although Farrell retained a psychologist – Dr. McMahon – to do a preliminary examination of Landrigan, McMahon explained by affidavit that he was "not able to follow up on my concerns and observations in my usual and customary manner," and that he informed Farrell that "much more work was needed to provide an appropriate psychological study for a death penalty case." JA 246. In response, Farrell told him "simply [to] write up [his] impressions." JA 247. Dr. McMahon's affidavit concluded that "[m]y experience with Dennis Farrell on this case was quite different from the working relationship I had with counsel on other death penalty cases in which the psychological study went through a series of steps . . . and plans for further investigation . . . . None of this occurred with Mr. Farrell." JA 247. Similarly, although Farrell employed an investigator, the investigator stated in an affidavit that he did not investigate mitigation because Farrell did not instruct him to do so, he spent virtually no time on the case, and he found his lack of interaction with Farrell "quite frustrating." JA 242-43.

Seeking to blame Landrigan for trial counsel's performance, the State asserts that he "actively thwarted his attorney's efforts to develop . . . mitigation evidence." Pet'r Br. i. No court in this case has made any such finding, and no evidence in the record of any proceeding thus far supports any such conclusion. *See, e.g.*, Ninth Cir. Oral Argument Audio at 43:55-44:30 ("[Judge Kozinski]: There's no [state court] finding at all even by inference as to investigation? There's . . . no finding that . . . the trial court made that goes to Landrigan's attitude about allowing his lawyer to investigate? . . . [Counsel for State]: I would agree."). On the contrary, Landrigan agreed to three continuances for the express purpose of developing mitigation and submitted to an initial psychological examination by Dr. McMahon. *See supra* pp. 3, 11.

Perhaps for that reason, the State suggests that Landrigan's comments *on the day of the sentencing hearing* should be construed as constraining counsel's ability to investigate. Pet'r Br. 21-22. But those comments obviously could not have hamstrung counsel's investigation *before* the hearing. The State therefore seeks to portray the hearing as a preliminary event that would have been followed by additional investigation, had Landrigan not obstructed it. *See id.* Once again, the present record does not support that assertion. By the time of the sentencing hearing, the parties had submitted sentencing memoranda setting forth their arguments for aggravation and mitigation, respectively. Pet. App. D-2, D-13. Moreover, in seeking three continuances prior to that hearing, Landrigan's trial counsel expressly stated that "[i]n the presentation of mitigating factors, rather than presenting it piecemeal, *I wish to present it all at one time*." JA 11 (emphasis added). That statement belies any contention that the sentencing hearing, at which trial counsel planned to present testimony from Landrigan's mother and ex-wife, was to be merely the start of a further investigative

phase. The sentencing hearing was always intended to be a sentencing hearing, and any suggestion to the contrary by the State can only be understood as a post hoc reconstruction of the actual course of the proceedings.

At bottom, the State's effort to blame Landrigan only serves to emphasize the need for an evidentiary hearing. As the en banc Ninth Circuit observed, "Landrigan's evidence has not been tested" and "Farrell has not been given an opportunity to explain what steps were taken in his investigation or why he did not do more." Pet. App. A-21. At this juncture, the State's conjecture cannot suffice to deny Landrigan an opportunity to establish the factual basis for his Sixth Amendment claim. His allegations, and the evidence submitted to the district court thus far, satisfy the colorable claim standard with respect to deficient performance.

2. Prejudice.

As with performance, further evidentiary development is warranted to determine whether trial counsel's ineffective assistance prejudiced Landrigan within the meaning of *Strickland*. As the en banc Ninth Circuit observed, "there was a significant amount of potential mitigating evidence that was not unearthed or presented to the sentencing judge." Pet. App. A-19. Landrigan's district court pleadings allege precisely the kind of "troubled history" that is "relevant to assessing a defendant's moral culpability." *Wiggins*, 539 U.S. at 535; *see also Penry*, 492 U.S. at 319 ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse." (internal quotation marks omitted)).

Moreover, the evidentiary materials Landrigan submitted to the district court suggest the existence of a powerful

mitigation case: a father who was a violent, paranoid drug addict and a mother who abused amphetamines, amphetamine-derivative inhalants, and alcohol while pregnant with Landrigan, JA 153-55, 161; malnutrition, untreated illness, and abandonment as an infant, JA 197-200; an alcoholic adoptive mother who was physically abusive, JA 148, 162, 183; serious alcohol and drug abuse beginning at an early age and becoming chronic during the teenage years, JA 186-87, 217-18, 225-26, 237; and admission to juvenile facilities as well as a psychiatric hospital, where Landrigan was treated with psychotropic drugs, JA 51, 148, 185, 228. *See supra* pp. 12-13.

Landrigan also submitted a declaration from Dr. Thomas C. Thompson, a psychologist who conducted clinical interviews and a neuropsychological evaluation of Landrigan and prepared a detailed family and social history. Dr. Thompson concluded that Landrigan suffers from a "brain dysfunction" that causes him to experience "difficulties in reasoning, forming useable strategies, and profiting from feedback." JA 149. He also diagnosed Landrigan with Antisocial Personality Disorder, which means that Landrigan was "unable to learn from past experiences, anticipate future consequences, or generalize [his] experiences into an organized body of knowledge that [could] serve to guide [his] behavior in an adaptive fashion." JA 152-53. Dr. Thompson confirmed that Landrigan's behavior fit the pattern of deficits associated with fetal alcohol syndrome. JA 155-56, 183.

Based on both the social history and the clinical evaluation, Dr. Thompson concluded that the "extent of [Landrigan's] disordered behavior was subsequently beyond the control of Mr. Landrigan. His actions did not constitute a lifestyle choice in the sense of an individual operating with a large degree of freedom, as we have come to define free

will." JA 160. Dr. Thompson explained that "[t]he inherited, prenatal, and early developmental factors severely impaired Mr. Landrigan's ability to function in society that expects individuals to operate in an organized and adaptive manner, taking into account the actions and consequences of their behaviors and their impact on society and its individual members." JA 160.

If established at an evidentiary hearing, the mitigation case Landrigan has alleged might well have made a difference in the ultimate assessment of Landrigan's "moral culpability." *Terry Williams*, 529 U.S. at 398; *Wiggins*, 539 U.S. at 535. Given the nature of the mitigating evidence, there is a reasonable probability that a competent attorney would have introduced it at sentencing, *see Wiggins*, 539 U.S. at 535, and that it would have made a difference in the outcome. Moreover, although Landrigan's outbursts at sentencing may have hurt his cause, those outbursts might not have occurred in the context of an adequately prepared mitigation case. And even if the outbursts had occurred, "if Landrigan's counsel had offered such mental health information, it could have actually explained his courtroom behavior and tempered his effect." Pet. App. A-20 n.5.[14]

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[14] In assessing Landrigan's mitigation evidence, the State focuses solely on "the suggestion that Landrigan suffers from antisocial personality disorder." Pet'r Br. 24. As the Ninth Circuit noted, however, that diagnosis "is only a small piece of the puzzle; the crux of Landrigan's argument is that the sentencing judge was never apprised of the full panoply of circumstances that, in the expert's opinion, converged to result in 'disordered behavior [that] was beyond the control of Mr. Landrigan.'" Pet. App. A-20 n.5 (quoting Dr. Thompson's affidavit, reprinted at JA 160). And the Arizona Supreme Court itself has held that the mitigating effect of antisocial personality disorder is greater when – as in Landrigan's case – there is evidence that the disorder "controlled [the] defendant's conduct or impaired his mental capacity" than when evidence suggests that, at the time of the crime, the defendant "possessed the ability to restrain himself." *State v. Brewer*, 826 P.2d 783, 802-03 (Ariz.

Nor was the State's aggravation case so compelling that an adequately prepared mitigation case could not have yielded a different outcome. This Court has made clear that counsel's failure to present mitigating evidence can be prejudicial even if the aggravating evidence is strong. *See Terry Williams*, 529 U.S. at 368, 398-99 (noting that, among his other crimes, Williams confessed to "brutally assault[ing] an elderly woman," leaving her "in a vegetative state," yet still finding that the mitigating evidence that counsel failed to investigate could have tipped the balance (internal quotation marks omitted)). The case in aggravation here was certainly no stronger than in *Terry Williams*, where the state demonstrated that Williams was "in the midst of a crime spree, preying on defenseless individuals," and presented powerful evidence that he "would commit future criminal acts of violence and . . . constituted a continuing threat to society." *Williams v. Warden of the Mecklenburg Correctional Center*, 487 S.E.2d 194, 196, 199 (Va. 1997), *rev'd in part*, 163 F.3d 860 (4th Cir. 1998), *rev'd*, 529 U.S. 362 (2000). Indeed, in the present case the sentencing judge

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1992), *cited in* Pet. at 21; *see also State v. Jones*, 4 P.3d 345, 367 (Ariz. 2000) ("An antisocial personality disorder, combined with other factors, may be a mitigating circumstance."); *State v. Eastlack*, 883 P.2d 999, 1019-20 (Ariz. 1994) (remanding for resentencing where the trial court failed to appoint an expert to explore mitigating evidence, in view of a psychiatrist's testimony at the guilt phase "that defendant had an antisocial personality disorder and that his mental condition may have been altered at the time of the murders due to cocaine use," and in view of testimony at sentencing that the defendant may not have "receive[d] proper bonding and attachment during the early part of his life"); *State v. McMurtrey*, 664 P.2d 637, 645-46 (Ariz. 1983) (remanding for resentencing because the trial judge failed to consider evidence of an antisocial personality disorder in the context of other mitigating evidence, such as a difficult family history). On resentencing in *Eastlack*, the court looked to the same factors that are at issue in Landrigan's case and concluded that the mitigating factors were substantial enough to call for leniency. JA 252.

expressly found that the murder was not "especially heinous, cruel or depraved," Pet. App. D-19, and the Ninth Circuit concluded that there was only "limited evidence" to support the conclusion that the murder was committed for pecuniary gain. Pet. App. A-20.

Until Landrigan's available mitigation evidence can be developed and subjected to adversarial testing, there is no reliable basis for assessing whether the failure by Landrigan's trial counsel to develop and present that evidence creates a probability "sufficient to undermine confidence in the outcome" of his sentencing proceeding. *Strickland*, 466 U.S. at 694; *see Wiggins*, 539 U.S. at 534. The State will have every opportunity to subject Landrigan's evidence to the crucible of adversarial testing. But Landrigan has certainly offered enough in the way of allegations and evidence with respect to prejudice to satisfy the "colorable claim" standard and entitle him to the evidentiary hearing he did not receive in state court.

3. The Purported "Waiver."

Further evidentiary development is also warranted on the issue of whether Landrigan's conduct "waived" his right to present a mitigation case and, consequently, his right to pursue a claim for ineffective assistance of counsel. Seeking to establish a conclusive waiver, the State repeatedly invokes the state post-conviction court's finding that Landrigan "instructed his attorney not to present any evidence at the sentencing hearing." Pet. App. F-4. As the Ninth Circuit correctly concluded, however, the transcript of the colloquy between Landrigan and the state trial court judge, and whatever findings the state courts may have made based on that colloquy, do not conclusively foreclose relief, and thus cannot be a basis for denying Landrigan an evidentiary

hearing. Pet. App. A-16, A-17.[15] To the contrary, Landrigan's allegations, if established, would entitle him to relief notwithstanding the colloquy at sentencing.

First, and most importantly, Landrigan contends that his actions at sentencing were themselves the product of his trial counsel's deficient performance. Any purported "waiver" therefore flowed directly out of trial counsel's ineffective assistance. At the time of the sentencing hearing, trial counsel had next to nothing to present in mitigation. He had failed to follow up on the examining psychologist's recommendation to conduct a full evaluation for presentation at sentencing and had failed to follow up on the many leads for additional mitigating evidence identified by the psychologist's initial examination and other sources. *See supra* pp. 9-11. He had likewise failed to prepare a social history or even interview the members of Landrigan's adoptive family (who would have been willing to provide powerful mitigating testimony). JA 188-89, 192; *see supra* pp. 9-10. Indeed, even with respect to the two witnesses he

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[15] The State appears to believe that the Ninth Circuit definitively held that Landrigan did not waive his right to put on any and all mitigation evidence and thus to pursue an ineffective assistance of counsel claim in post-conviction proceedings. Pet'r Br. 10-11. In Respondent's view, the better reading of the opinion is that the Ninth Circuit remanded for an evidentiary hearing on all issues comprised within Landrigan's claim, including the purported waiver. Pet. App. A-17 (noting that the record does not "indicate that Landrigan's decision was informed and knowing" and commenting on other deficiencies in the record). Of course, it would certainly have been defensible for the Ninth Circuit to conclude, based on the existing record, that the state court's waiver ruling was an unreasonable application of clearly established law and an unreasonable factual determination. In any event, this Court "reviews judgments, not statements in opinions." *Johnson v. DeGrandy*, 512 U.S. 997, 1003 & n.5 (1994) (internal quotation marks omitted). Because the judgment to remand for an evidentiary hearing was plainly correct, it should be affirmed. The Court's opinion can clarify the appropriate scope of the issues subject to consideration at the evidentiary hearing.

brought to testify, trial counsel apparently never inquired in advance into family history and other potential sources of mitigating information. *See supra* p. 9 n.5.

Thus, even assuming *arguendo* that the colloquy could be construed as a renunciation of Landrigan's right to put on any mitigation case, Landrigan did so without knowing what he would be giving up. His decision can hardly be said to be an "informed strategic choice made by the defendant," *Strickland*, 466 U.S. at 691, based on an adequate foundation provided by counsel. To the contrary, whatever choice Landrigan may have made during the sentencing hearing, it was a choice lacking any foundation whatsoever because his trial counsel had not done the work necessary to prepare an adequate case in mitigation.

Indeed, there is at least a reasonable probability that the sentencing hearing would have unfolded in an entirely different manner had Landrigan's counsel investigated and been ready to present the mitigation case that was available, including the complete social history, expert medical testimony, and accounts of other witnesses. Even if Landrigan had not wished to subject his mother and ex-wife to the strain of testifying, the mitigation case could have been made through the many other available witnesses. But Landrigan had no idea that this alternative approach was available to him because his trial counsel had not prepared the case.

At bottom, Landrigan's purported "waiver" was simply a manifestation of the prejudice Landrigan suffered as a result of trial counsel's deficient performance. *See Strickland*, 466 U.S. at 691; *see also Hill*, 474 U.S. at 56-60 (ineffective assistance renders a waiver of the right to trial invalid if, absent counsel's deficient performance, there is a reasonable probability that the defendant would not have effected the waiver). Because the validity of any purported waiver is

inextricably intertwined with the issue of trial counsel's performance, it must be the subject of an evidentiary hearing.[16]

Second, even apart from its roots in trial counsel's deficient performance, Landrigan contends that any purported waiver was not knowing and intelligent. *See Iowa v. Tovar*, 541 U.S. 77, 81 (2004); *Schneckloth v. Bustamonte*, 412 U.S. 218, 235-40 (1973). For a waiver to be knowing and intelligent, the defendant must have "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986).[17]

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[16] The state post-conviction court brushed aside Landrigan's statement that he "would have cooperated" on the ground that "the defendant's statements at sentencing belie his new-found sense of cooperation." Pet. App. F-4. That conclusion ignores the fact that Landrigan *did* cooperate with counsel's scant investigative efforts. *See supra* pp. 3, 11. Further, an evidentiary hearing would give the court the benefit of live testimony from Landrigan (along with other relevant witnesses), not just an affidavit. Finally, the state court's conclusion can be only as strong as the reasoning on which it rests – *i.e.*, the court's understanding of "the defendant's statements at sentencing" as a broad, valid waiver of his right to present mitigation evidence. *See Wiggins*, 539 U.S at 530-31 (rejecting state court's factual determination because it was based on an erroneous assumption).

[17] *See also Coleman v. Mitchell*, 268 F.3d 417, 447-48 & n.16 (6th Cir. 2001) (alleged waiver was invalid because the record did not show that petitioner "had any understanding of competing mitigation strategies"); *Battenfield v. Gibson*, 236 F.3d 1215, 1229-33 (10th Cir. 2001) (alleged waiver was invalid where there was "no indication [counsel] ever explained the general meaning of mitigation evidence . . . or what specific mitigation evidence was available" and "only knew that [counsel] intended to put his parents on the witness stand"); *Wilkins v. Bowersox*, 145 F.3d 1006, 1015-16 (8th Cir. 1998) (alleged waiver was invalid where the petitioner "did not understand his legal alternatives"); *cf. Whitmore v. Arkansas*, 495 U.S. 149, 165 (1990) (treating it as self-evident that valid waiver of the right to appeal a death sentence must be knowing and voluntary).

The State does not contest that Landrigan's waiver must be knowing and intelligent. And the state courts made no finding that Landrigan's conduct was a knowing and intelligent waiver. The State therefore resorts to attacking Landrigan for an argument he does not make – namely, that the right to put on a case in mitigation can never be waived. *See* Pet'r Br. 23. And while the State argues in the alternative that "there should be no doubt that Landrigan understood the basic concept of mitigation," Pet'r Br. 21, the present record does not provide any support for that contention. In particular, the record does not reflect that Landrigan was ever informed of the nature and extent of his right to present a case in mitigation. *Cf. Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969) (court taking guilty plea is responsible for ensuring that the record is adequate for review). After the court asked Landrigan if it was true that he did not wish to present mitigating evidence, it further asked, "Do you know what that means?" Landrigan replied, "Yeah." Pet. App. D-3. That is the *entirety* of the recorded colloquy with Landrigan regarding his understanding of the mitigation right; it provides no basis for ascertaining whether Landrigan in fact understood the right.

Nor can a valid waiver be established on the basis of trial counsel's statement that he "told [Landrigan] that in order to effectively represent him, especially concerning the fact that the State is seeking the death penalty, any and all mitigating factors, I was under a duty to disclose those factors to this Court for consideration regarding the sentencing." Pet. App. D-3. Read in context, trial counsel's statement is quite clearly about the two witnesses available to testify – not about a broad mitigation case (which, after all, counsel had failed to prepare). Moreover, even if true (an issue that should be subject to adversarial testing at an evidentiary hearing), trial counsel's representation does not come close to establishing that Landrigan had been informed of the

meaning of "mitigating evidence," the utility of presenting mitigating evidence, what can constitute mitigating evidence, and the consequences of waiving the right to present mitigating evidence. *Cf. Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005). And without knowing what kind of mitigation case was available to him in the first place, Landrigan was of course in no position to make an informed decision on this critically important question.

Third, Landrigan contends that his intent was not to effect a broad waiver but, instead, merely to waive presentation of testimony from his mother and his ex-wife. The Ninth Circuit en banc majority concluded that the colloquy was most reasonably interpreted in this way, and the two dissenters did not disagree. *See* Pet. App. A-12 to A-16, A-22 to A-27. As the majority explained, considered in context, it is very probable that Landrigan intended his answers to the state trial judge only to confirm that he did not want his mother and ex-wife to testify. After all, as the Ninth Circuit pointed out, when "the sentencing judge asked Landrigan whether he instructed his lawyer not to present any mitigating circumstances, the only mitigating evidence the lawyer could have brought to the court's attention was the testimony of the two witnesses." Pet. App. A-15.

Thus, at a minimum, there is very substantial reason to doubt that Landrigan intended to forgo his right to put on a mitigation case and that his conduct can be deemed a legally sufficient waiver of that critically important right. There is thus no basis on the current, incomplete record to deny Landrigan the opportunity to proceed further. Nothing in § 2254(d) or (e) provides any justification for denying Landrigan an evidentiary hearing – a hearing he requested in part for the very purpose of establishing that he did not intend to give up the right to make a mitigation case (and cannot be legally deemed to have done so). Although these

provisions prescribe a measure of deference to state court determinations, "[d]eference does not by definition preclude relief." *Miller-El I*, 537 U.S. at 340 (discussing §§ 2254(d)(2) and 2254(e)(1)). Likewise, this Court has stressed that AEDPA's standard for overcoming state court factual determinations is "demanding but not insatiable." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) ("*Miller-El II*").

It is certainly possible that Landrigan will be able to substantiate his allegations that his conduct did not waive his rights because it was the product of counsel's failure to develop a mitigation case, it was not knowing and intelligent, and it was not intended to be a renunciation of all possible avenues of mitigation. Indeed, it is quite likely that he will succeed, given that the state court did not even purport to consider whether Landrigan's "waiver" was itself the product of trial counsel's deficient performance, or whether it was knowing and intelligent (and the trial transcript fails to establish that it was). Of course, the State will be able to press arguments at the evidentiary hearing regarding the scope of Landrigan's interest in pursuing a mitigation case. *See* Pet'r Br. i, 23. Those and other factual issues can be properly resolved on the basis of testimony and other evidence. They should not be conclusively determined now, before the needed evidentiary development has occurred.[18]

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[18] There is no merit to the suggestion by Amicus Criminal Justice Legal Foundation that a federal evidentiary hearing cannot bear on how the federal courts treat the state court's finding of waiver. Amicus Br. of CJLF at 5-6. The State itself does not make this argument, so this Court should deem it waived. *Cf. Miller-El II*, 545 U.S. at 256-57 n.15. In all events, it is meritless, as every court of appeals to have considered it has concluded. *See Taylor v. Maddox*, 366 F.3d 992, 999-1000 (9th Cir. 2004) (Kozinski, J.); *Lambert v. Blackwell*, 387 F.3d 210, 235-36 & n.19 (3d Cir. 2004), *cert. denied*, 544 U.S. 1063 (2005); *Valdez v. Cockrell*, 274 F.3d 941, 951-52 (5th Cir. 2001); *Matheney v. Anderson*, 377 F.3d

Indeed, where – as here – a state court has barred a procedurally blameless habeas petitioner from developing evidence, it would be fundamentally unjust for a federal habeas court's review of the petitioner's colorable claim to be limited to the evidence before the state court if additional evidence is relevant. Section 2254(e)(2)'s "failed to develop" standard only bolsters this conclusion. As Justice Kennedy wrote for a unanimous Court in *Michael Williams v. Taylor*, a petitioner does not "fail[] to develop" the factual basis for a claim when the lack of development is not the petitioner's fault. 529 U.S. at 432. Given that § 2254(e)(2) thus preserves Landrigan's right to an evidentiary hearing, it would be perverse for that hearing right to be rendered irrelevant because the state court prematurely decided the merits of his federal constitutional claim – without considering evidence indispensable to a just and reliable resolution of that claim. As the Ninth Circuit held, Landrigan should be given a hearing so that he can make his

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740, 747 (7th Cir. 2004), *cert. denied*, 544 U.S. 1035 (2005); *Pecoraro v. Walls*, 286 F.3d 439, 443 (7th Cir. 2002) (Posner, J.); *Bryan v. Mullin*, 335 F.3d 1207, 1215-16 (10th Cir. 2003) (en banc); *cf. LeCroy v. Secretary, Fla. Dep't of Corrections*, 421 F.3d 1237, 1262-63 & n.30 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 1458 (2006); *Monroe v. Angelone*, 323 F.3d 286, 298-99 (4th Cir. 2003). Nor can amicus CJLF's argument be squared with what this Court said on the subject in *Holland v. Jackson*, 542 U.S. 649 (2004) (per curiam) – a case that CJLF does not mention. *Holland* reversed an appeals court's grant of habeas relief on the basis of a statement not properly before the state court, explaining that "whether a state court's decision was unreasonable must be assessed in light of the record the court had before it." *Id.* at 652. But the Court also made quite clear that the statement *could* have been the subject of a federal evidentiary hearing, so long as § 2254(e)(2) did not preclude such a hearing. *See id.* at 652-53; *see also Bradshaw v. Richey*, 126 S. Ct. 602, 605-06 (2005) (per curiam). This conclusion applies here regardless of whether the "waiver" finding is considered a mixed question of law and fact or a purely factual determination.

case on the merits and his claim can be decided based on an accurate assessment of the facts.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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December 18, 2006

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ADDENDUM

STATUTORY ADDENDUM

28 U.S.C. § 2243 Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

28 U.S.C. § 2254 State custody; remedies in Federal courts

* * * *

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

* * * *

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Supreme Court, U.S.
FILED
JAN 0 2 2007
OFFICE OF THE CLERK

No. 05–1575

IN THE SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO, ET. AL.,

Petitioners,

vs.

JEFFREY TIMOTHY LANDRIGAN, A.K.A.
BILLY PATRICK WAYNE HILL,

Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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SUMMARY OF ARGUMENT

This Court granted certiorari to decide two questions: (1) In light of the highly deferential standard of review required under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), did the Ninth Circuit err by holding that the state court unreasonably determined the facts when it found that Landrigan "instructed his attorney not to present any mitigating evidence at the sentencing hearing?", and (2) Did the Ninth Circuit err by finding that the state court's analysis of Landrigan's ineffective assistance of counsel claim was objectively unreasonable under *Strickland v. Washington*, 466 U.S. 668 (1984), notwithstanding the absence of any contrary authority from this Court in cases in which (a) the defendant waives presentation of mitigation evidence and impedes counsel's attempts to do so, or (b) the evidence the defendant subsequently claims should have been presented is not mitigating?

Landrigan's Brief on the Merits attempts to complicate a relatively uncomplicated analysis. Landrigan sidesteps the two issues before the Court and argues instead that the only issue that should be considered is whether the Ninth Circuit erred in ordering an evidentiary hearing. (Resp. Br. at 19.) He argues that his current allegations create a "colorable claim" entitling him to an evidentiary hearing, and that the AEDPA does not affect that analysis. (*Id.* at 32-34.)

Landrigan's arguments fail because, in this collateral review proceeding brought under 28 U.S.C. § 2254, the proper analysis does not turn on his current allegations, but rather on whether the state court unreasonably determined the facts or unreasonably applied clearly established federal law in rejecting

Landrigan's ineffective assistance of counsel claim.

The state court found that Landrigan instructed his attorney not to present any mitigating evidence at sentencing. That factual finding was entitled to deference under the AEDPA.

The state court's interpretation of Landrigan's statements at the time of sentencing was reasonable, and is further supported by the fact that Landrigan did not subsequently claim on appeal or in his post-conviction proceeding that his statements had been misconstrued or were somehow involuntary. The record before the trial court at the time of Landrigan's post-conviction proceeding fully supports the trial court's factual determination that Landrigan instructed his attorney not to present any mitigation, and that his "new-found sense of cooperation" in alleging that he would have allowed presentation of evidence of a biological/organic predisposition to violence was not believable.

The Ninth Circuit's refusal to defer to the state court's factual finding is particularly inappropriate here because that finding was made by the same judge who had previously presided over Landrigan's trial and sentencing. In addressing Landrigan's post-conviction claim, the trial judge was uniquely qualified to assess the context of Landrigan's statements at sentencing, and her assessment of Landrigan's credibility is entitled to great deference.

Because the trial court found that Landrigan chose not to present mitigation evidence and that his assertion that he would have cooperated in presenting one type of mitigation evidence was not credible, there was no need for an evidentiary hearing in state or federal court. No additionally-developed mitigation evidence would have created a basis for finding that the result

of the sentencing proceeding would have been different because Landrigan would not have allowed his attorney to present the evidence at sentencing.

Finally, even assuming the state court's assessment that Landrigan did not want to present *any* mitigation does not resolve his ineffective assistance of counsel claim, the Ninth Circuit erred by granting relief because the evidence Landrigan now proffers is not compelling mitigation. Landrigan repeatedly asserts that the evidence he now seeks to develop is the type of evidence that would have affected the sentencer's decision. However, the very judge who sentenced Landrigan also considered his post-conviction claim and rejected it as "frivolous" notwithstanding Landrigan's allegation of a genetic predisposition to violence. Additionally, the Arizona Supreme Court, having previously independently reviewed and affirmed Landrigan's death sentence on direct review, declined review of the post-conviction ruling. The state courts' determination that Landrigan's ineffective assistance claim was "frivolous" refutes Landrigan's assertion that his additional mitigation evidence would have changed the outcome of the sentencing proceeding.

The state court's resolution of Landrigan's ineffective assistance of counsel claim was not an unreasonable application of federal law as set forth by this Court. Under any standard of deference, much less the highly deferential standard required under the AEDPA, the state court ruling should stand.

STATEMENT OF THE CASE

Petitioners rely on the Statement of the Case set forth in their Brief on the Merits.

Landrigan suggests that this case involves a relatively benign murder, with the trial judge imposing a death sentence despite having concluded that "the nature of the murder [] is really not out of the ordinary when one considers first degree murder." (Resp. Br. at 5-6.) That characterization ignores, however, the trial judge's subsequent comments, in which she stated that Landrigan is an "exceptional" defendant who stands out as an "amoral person" with "no scruples and no regard for human life." (Pet. App. D at 23.)

ARGUMENTS

I. The Ninth Circuit Exceeded Its Authority Under the AEDPA When It Rejected the State Court's Factual Finding that Landrigan Instructed His Defense Attorney not to Present any Mitigating Evidence.

Landrigan suggests that deference under 28 U.S.C. § 2254 to state court factual findings is not at issue here because the Ninth Circuit did not definitively hold that Landrigan did not waive his right to present any mitigating evidence. (Resp. Br. at 43, n. 15.) However, he ignores the following language from the Ninth Circuit ruling:

> The state supreme court found that, "[a]t the sentencing hearing, defendant instructed his lawyer not to present any mitigating evidence." And the state habeas court similarly found that

> Landrigan "instructed his attorney not to present any evidence at the sentencing hearing." In light of what actually transpired at the sentencing hearing, such an overly broad characterization of the colloquy is not supported by the record and thus amounts to an "unreasonable determination of the facts." 28 U.S.C § 2254(d)(2).

(Pet. App. A at 15-16.) The Ninth Circuit thus unequivocally treated the trial court's ruling that Landrigan instructed his attorney not to present any mitigating evidence as a factual finding.

Landrigan nevertheless argues that he is entitled to an evidentiary hearing because he "has alleged that any purported waiver was not knowing and intelligent, and that he intended at most to forgo his right to put on his ex-wife and birth mother as witnesses." (Resp. Br. at 20.) Landrigan's argument fails because there is a reasoned basis for the state court's factual finding and because Landrigan never alleged at sentencing or during his post-conviction proceeding that his decision not to present any mitigating evidence was not knowing and intelligent. Nor did he allege that he intended at most to forgo his right to call his ex-wife and birth mother as witnesses. Landrigan's petition for post-conviction relief made no such assertions, and his affidavit avowed only that he would have cooperated in developing evidence of a biological component to violence.[1]

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[1]Landrigan's only assertion that his waiver may have been involuntary was in a motion for rehearing from the denial of his post-conviction petition. (JA 99, 102). The motion did not include any type of affidavit or avowal from Landrigan supporting that assertion. Under Arizona (Continued)

Noticeably absent from Landrigan's affidavit is any avowal that Landrigan did not mean what he said at sentencing or that his statements were misconstrued.[2] Because the defendant bears the burden of establishing the basis for a post-conviction claim, the absence of any indication that Landrigan's decision not to present mitigating evidence was involuntary further supports the trial court's factual conclusion that Landrigan instructed his attorney not to present *any* mitigating evidence.

Furthermore, the evidence developed by Landrigan's federal habeas counsel further supports the conclusion that Landrigan waived presentation of *all* mitigation evidence, not just testimony from two family members. The "new" evidence developed in federal court included a 10-page report (J.A. at 129) prepared prior to sentencing by a mental health expert, Dr. Mickey McMahon, who had examined Landrigan prior to sentencing at counsel's request. The report detailed information about Landrigan's family background, including information about possible in-utero drug use by Landrigan's birth mother, and information that Landrigan's birth father had served time in

(Continued).

law, however, a defendant cannot raise new issues in a motion for rehearing. *State v. Byers*, 613 P.2d 299, 302 (Ariz. App. 1980), *overruled on other grounds*, *State v. Pope*, 635 P.2d 846 (Ariz. 1981).

[2] The relevant portion of Landrigan's affidavit states:

8. That despite the foregoing trial counsel did not discuss with Petitioner, nor to his knowledge consider presenting testimony regarding the biological component of violence, as mitigation evidence at sentencing.
9. That had trial counsel raise this aspect of mitigation evidence with him, Petitioner would have cooperated in presenting that evidence and, on information and belief, Mr. Darrel Hill would also have cooperated.

prison and had a history of physically abusing and trying to kill Landrigan's mother. (*Id.*) Thus, prior to sentencing, Landrigan's counsel had significant information (in addition to what was set forth in the presentence memorandum) that could have been presented at sentencing. This evidence need not have been admitted exclusively through Landrigan's birth mother or ex-wife. In fact, Landrigan could have established these facts through his own testimony. Thus, it was not unreasonable for the state court to conclude that Landrigan's statement to the court that he did not want any mitigation to be presented included information beyond testimony from two family members.

The state court's conclusion that Landrigan did not want counsel to present *any* mitigation evidence at the time of sentencing is not only "supportable," it stands as the most logical conclusion based on the record at sentencing and the record developed in the post-conviction proceeding and in federal court. *See also Landrigan v. Stewart*, 272 F.3d 1221, 1225 (9th Cir. 2001) ("In the constellation of refusals to have mitigating evidence presented, . . . this case is surely a bright star.").

The state court's conclusion was not an unreasonable interpretation of the facts under any standard of review. The trial court's assessment that Landrigan was not believable in asserting that he would have allowed counsel to present one type of mitigation evidence is similarly supported by the record. First, the same judge who had presided over Landrigan's trial and sentencing proceedings made this credibility assessment. That fact is significant. *See Williams v. Taylor*, 529 U.S. 362, 396-97 (2000) (rejecting state supreme court's assessment of a lack of *Strickland* prejudice and noting that "the very judge who presided at Williams' trial, and who once determined that the death penalty was 'just' and 'appropriate,' concluded that there

existed 'a reasonable probability that the result of the sentencing phase would have been different' if the jury had heard that evidence."). Second, Landrigan's statements and conduct at sentencing left little question as to his wishes and support the trial judge's assessment of Landrigan's credibility at the post-conviction stage. The trial judge's factual finding that Landrigan instructed his attorney not to present *any* mitigating evidence should be upheld.

II. The Ninth Circuit Exceeded Its Authority Under the AEDPA When It Found that the State Court's Ruling was an Unreasonable Application of Clearly Established Federal Law.

The relevant inquiry on federal collateral review is whether the state court's analysis of Landrigan's ineffective assistance of counsel claim reasonably applied controlling federal law as determined by this Court. 28 U.S.C. § 2254(d)(2). The state court analyzed Landrigan's claim under clearly established federal case law, citing to *Strickland* and noting that ineffective assistance of counsel may be established by demonstrating (1) that counsel's conduct fell below an objective standard of prevailing professional norms and (2) that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's deficient performance. (Pet. App. F at 4.)

The state court's rejection of Landrigan's ineffective assistance of counsel claim was not unreasonable under any standard, much less the "doubly deferential" standard required under the AEDPA when review is conducted through the lens of federal habeas. *See Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). Because Landrigan did not want counsel to present *any* mitigation evidence at sentencing, he cannot satisfy the prejudice prong with regard to any conceivable mitigation he

now claims counsel should have been developed. Thus, the state court's denial of his ineffective assistance claim was not an unreasonable application of *Strickland*.

Landrigan characterizes the state court's ruling as simply "express[ing] skepticism about Landrigan's Sixth Amendment claim." (Resp. Br. at 8.) He suggests that the state post-conviction court did not resolve this claim on the merits because the state court also ruled that the claim was procedurally barred. (*Id.*) Landrigan further argues that "the ultimate merits inquiry" cannot be carried out until there is further factual development.

Landrigan's characterization of the state court's ruling is inaccurate because the court did more than express skepticism about Landrigan's Sixth Amendment claim. The state court expressly rejected the claim on the basis that, "[s]ince the defendant instructed his attorney not to bring any mitigation to the attention of the court, he cannot now claim counsel was ineffective because he did not 'explore additional grounds for arguing mitigation evidence.'" (Pet. App. F at 4.) The state court further referred to the claim as both "frivolous" and precluded. (*Id.* at 5.)

The appropriate analysis on federal collateral review does not turn on any specific legal ruling by a state court, but rather on whether the state court resolved a constitutional claim in a manner that unreasonably applied clearly established federal law as determined by this Court. 28 U.S.C. § 2254(d)(2). Here, the state court resolved Landrigan's constitutional claim by denying it after applying *Strickland*. That denial is consistent with clearly established federal law as determined by this Court.

Further factual development is unnecessary. Based on the evidence before the trial judge when she considered Landrigan's petition for post-conviction relief, there was no reason to hold an evidentiary hearing. Taking as a given that Landrigan would testify in a post-conviction proceeding that he would have cooperated in presenting evidence of a genetic predisposition to violence, the trial judge nevertheless rejected Landrigan's assertion because it was not believable in light of his statements and conduct at sentencing. An evidentiary hearing to develop additional mitigation evidence was thus unnecessary because it would not have affected the ultimate resolution of Landrigan's ineffective assistance of counsel claim.

Landrigan incorrectly states that Petitioners did not argue to the Ninth Circuit that § 2254(e)(2) precluded an evidentiary hearing in Landrigan's case, (Resp. Br. at 26), and that Petitioners "effectively concede[] that § 2254(e)(2) does not preclude a hearing because Landrigan diligently sought, and was denied, the opportunity to make his factual case in state post-conviction proceedings." (Resp. Br. at 19.) Petitioners expressly objected under § 2254(e)(2) to Landrigan's attempt to develop evidence in federal court that was not presented to the state courts. (Respondents-Appellee's Answering Brief, filed Feb. 12, 2001, at 40.) Petitioners have never conceded that a hearing is appropriate under § 2254(e)(2), and have instead consistently maintained that Landrigan's express instruction not to present mitigating evidence at sentencing obviated the need for an evidentiary hearing to develop mitigating evidence.

In Arizona, a defendant who files a petition for post-conviction relief is not entitled to an evidentiary hearing unless he raises a "colorable" claim. *See* Ariz. R. Crim. P. 32.6; *State v. Borbon*, 706 P.2d 718, 725 (Ariz. 1985). Factual allegations must be supported by affidavits, setting forth what an alleged

witness would testify to at an evidentiary hearing. *Borbon*, 706 P.2d at 725. Because the only type of evidence Landrigan avowed he would have permitted counsel to present was evidence of a genetic predisposition to violence, Landrigan was not diligent in attempting to develop any other type of evidence in state court.

In any event, the remand for a hearing was unnecessary because the evidence Landrigan now proffers lacks mitigating value. Landrigan asserts that "the allegations and evidence presented thus far are of exactly the kind that could influence a sentencer to impose a sentence of life imprisonment rather than death," (Resp. Br. at 33.) However, the very judge who sentenced Landrigan was unmoved by Landrigan's post-conviction claim that counsel should have presented evidence of a genetic predisposition to violence. Furthermore, the evidence Landrigan seeks to develop helps establish that he has an antisocial personality disorder, with personality traits that the Arizona Supreme Court found *unfavorably* distinguished Landrigan from other defendants and supported the imposition of the death penalty. (J.A. at 65.) Thus, the evidence Landrigan seeks to develop would not have changed the sentencing outcome.

The state court's resolution of Landrigan's ineffective assistance of counsel claim is entirely consistent with this Court's *Strickland* jurisprudence. In *Strickland*, this Court reiterated that the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own actions. 466 U.S. at 691. In *Williams*, this Court noted that the proper focus of federal habeas review is not a search for any constitutional error, but rather for "errors that undermine confidence in the fundamental fairness of the state adjudication." 529 U.S. at 375. This Court further noted that a claim of ineffective assistance of counsel must be based on the

deprivation of a substantive or procedural right to which a defendant is entitled. *Id.* at 393. There is no constitutional prohibition against waiving mitigation, and no constitutional requirement to present mitigation evidence over a defendant's objection. *See Blystone v. Pennsylvania*, 494 U.S. 299, 306 n.4 (1990). Nor is there a constitutional requirement that any particular colloquy be followed in assessing how much, if any, mitigation a defendant chooses to present. Given Landrigan's clear objection to presentation of mitigation evidence and his active interference with counsel's attempts to present favorable information to the sentencing court, there is nothing fundamentally unfair about the state court's ruling denying Landrigan's ineffective assistance of counsel claim.

Landrigan's assertion that *Williams*, *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Wiggins v. Smith*, 539 U.S. 510 (2003), support his position is unpersuasive. Most obviously, yet ignored in Landrigan's analysis, the defendants in those cases did not forgo presentation of mitigation or affirmatively undermine their attorneys' efforts to present mitigation evidence.

In *Williams*, defense counsel failed to obtain records describing Williams' "nightmarish childhood" because counsel wrongly believed that state law denied them access to the records. 529 U.S. at 395. Williams' counsel also failed to introduce available mitigating evidence, or to seek readily available information that might have benefited him. *Id.* at 396. In contrast, Landrigan's counsel had a mental health expert examine Landrigan, and counsel submitted a presentence memorandum detailing mitigating factors, which included information about Landrigan's prior substance abuse problems and difficult family background. (J.A. at 16-52.) Landrigan's counsel also brought Landrigan's biological mother and ex-wife

to the sentencing hearing; those witnesses did not testify only because Landrigan insisted that they not do so.

Williams also differs from Landrigan's case because the same judge who heard the testimony presented at Williams' sentencing hearing considered Williams' post-conviction claim and found that there was "a reasonable probability" that Williams would not have received the death penalty had the jury heard the mitigating evidence his counsel failed to present. *Id.* at 397. In contrast, the original trial judge in this case considered Landrigan's post-conviction claim and rejected it as "frivolous."

In *Rompilla*, the deficiency in counsel's performance stemmed from counsel's failure to examine the court file pertaining to Rompilla's prior conviction, which was the basis for an aggravating circumstance central to the prosecutions penalty phase case. 125 S.Ct. at 2470 (J. O'Connor, concurring). Here, defense counsel attempted to mitigate the aggravating value of Landrigan's prior conviction by bringing in Landrigan's ex-wife to place a more favorable spin on the facts underlying that offense. However, Landrigan prevented his ex-wife from testifying, and he contradicted his attorney's assertions that Landrigan had acted in self-defense.

In *Wiggins*, counsel (rather than the defendant) made a "decision to limit the scope of their investigation into potential mitigating evidence." 539 U.S at 521. In contrast, Landrigan instructed his attorney not to present mitigation witnesses, and actively interfered with his attorney's efforts to put any mitigating information before the court. Furthermore, while this Court characterized the mitigation evidence that Wiggins' counsel failed to discover and present as "powerful," *id.* at 535, the only additional mitigation that Landrigan avowed he would have allowed was evidence of a genetic propensity for violence.

Such evidence, even if scientifically plausible, cuts both ways, and provides little mitigating value.

Finally, the fact that the Ninth Circuit's "only holding" is the granting of an evidentiary hearing, (*see* Resp. Br. at 1), does not change the analysis. In *Williams*, this Court noted that Congress, by enacting the AEDPA, evidenced an intent to heighten the deference afforded state court factual and legal determinations and to "curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." 529 U.S. at 386. This case has been in the federal courts for over 10 years. Ordering an evidentiary hearing to develop evidence that would not have affected the sentencing decision is not only pointless, but defeats the intent and purpose of the AEDPA. Because the state court's factual determination that Landrigan instructed his attorney not to present any mitigation evidence was not an unreasonable factual finding, an evidentiary hearing is unwarranted. The Ninth Circuit's ruling should be reversed.

CONCLUSION

For these reasons, the State respectfully requests that this Court reverse the judgment of the Ninth Circuit and order that Landrigan's federal habeas petition be denied with prejudice.

Respectfully submitted

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File Date: 12/18/2006

No. 05-1575

In The Supreme Court of the United States

DORA B. SCHRIRO, *et al.*,

Petitioners,

v.

JEFFREY TIMOTHY LANDRIGAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENT

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OTHER AUTHORITIES

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BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS*

The American Bar Association ("ABA") is the principal voluntary national membership organization of the legal profession. Its more than 413,000 members include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer "associates" in allied fields.[1]

The ABA has a well-established tradition of advocating for the ethical and effective representation of all clients and has drafted, promulgated and interpreted rules of professional conduct for almost a century. In 1908, the ABA adopted the Canons of Professional Ethics and in 1913, the ABA established the Standing Committee on Professional Ethics. In 1969, the ABA adopted the Model Code of Professional Responsibility which was subsequently adopted by the

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, or counsel, has made a monetary contribution to this brief's preparation or submission. In addition, the parties have consented to the filing of *amicus* briefs in this matter.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No member of the Judicial Division Counsel has participated in the adoption or endorsement of the position of this brief, nor was it circulated to any member of the Judicial Division Counsel prior to filing.

vast majority of state and federal courts. In 1983, the ABA drafted the Model Rules of Professional Conduct. Today, all but a handful of jurisdictions have adopted a version of the Model Rules. Arizona adopted the ABA Model Rules of Professional Conduct with some amendments on February 1, 1985.

Since August 1908, when the ABA adopted the original Canons of Ethics, an unbroken thread that runs through every iteration of each set of rules has been the lawyers' dedication to the client's cause, competence in every endeavor, diligence in the timely provision of legal services, and communication with the client at every step of the way so that client decisions only follow well informed discussions with their lawyers. As the *amicus* in the present matter, the ABA can provide this Court with a description of the ethical norms the ABA believes this Court should apply to the questions this case presents. Accordingly, the brief of the *amicus* will focus on the lawyer's ethical obligations as defined by the ABA Model Rules of Professional Conduct as adopted by the Supreme Court of Arizona.

SUMMARY OF THE ARGUMENT

A judicial determination about the adequacy of counsel's efforts in defending a capital defendant requires inquiry into whether counsel adequately advised the client of the role and purpose of presenting mitigating evidence, whether counsel sought to locate mitigating evidence, whether counsel unreasonably failed to uncover crucial evidence, and whether counsel made sound judgments in withholding

mitigating evidence. In the instant case, the Court of Appeals reasonably found that the record has not been developed on those issues. The merits of Landrigan's Sixth Amendment claim should not be reached without first developing and analyzing such a complete factual record. Failure to require the parties to develop such a record would cast uncertainty on well-acknowledged standards governing the duty of lawyers to advise their clients knowledgeably only after conducting a sufficient investigation to inform themselves about the essential facts bearing on the client's rights and interests. A decision on the merits must be based on the application of law to established facts regarding the lawyer's investigation and advice so that defense lawyers can be instructed as to what is required to meet their ethical obligations.

Under *Strickland v. Washington*, 466 U.S. 668 (1984), a valid ineffective assistance of counsel claim requires the habeas petitioner to show that counsel's performance was deficient and that the deficiency prejudiced the defense.[2] The proper measure of lawyer performance under the first prong of the *Strickland* test is "simply reasonableness under

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[2] It should be noted that the same factual basis that is necessary to make a determination as to the performance prong of *Strickland* is also at least partially necessary to make any determination regarding the waiver issue under the prejudice prong of *Strickland*. Both inquiries require examination of whether counsel informed Landrigan of the nature of mitigation evidence, its importance, the kinds of mitigating evidence potentially applicable to Landrigan's case based upon counsel's reasonable investigation, and the potential consequences of presenting or not presenting such evidence. *See Tollett v. Henderson*, 411 U.S. 258, 268 (1973).

prevailing professional norms." 466 U.S. at 688. These professional norms exist in many forms, including ethical rules of conduct, ABA Standards and common law duties. *See id.* at 688-89.

Several interrelated professional norms of lawyer performance are relevant to the matter presently before the Court. As a fundamental principle, lawyers are agents of their clients and, as such, they should obey their clients and pursue their clients' objectives so long as the clients are competent and the clients' objectives are not illegal or unethical. *See* ABA MODEL RULE OF PROF'L CONDUCT 1.2.; CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 146, 164 (1986). However, before eliciting and then following their clients' directions, lawyers have a duty to advise and inform their clients to ensure that any client decisions regarding the representation are informed ones. *See* ABA MODEL RULE OF PROF'L CONDUCT 1.4(b). In turn, to provide competent information and advice to clients, lawyers must adequately investigate the matters at issue. *See* ABA MODEL RULE OF PROF'L CONDUCT 1.1; ABA STANDARD FOR CRIMINAL JUSTICE 4-4.1. Simply put, counsel has obligations to provide information and advice based upon adequate investigation and research.

The existence of these obligations gives rise to a series of factual questions that must be addressed in an evidentiary hearing before the merits of Landrigan's constitutional claim can be adjudicated. The present record, however, is silent regarding whether - and to what extent -- counsel informed Landrigan about the purpose of mitigating evidence. It is also undeveloped

with respect to the scope of counsel's investigation into mitigating evidence, the kinds of mitigating evidence that were potentially available in Landrigan's case, and the advantages and disadvantages of presenting that evidence. Accordingly, the Ninth Circuit majority properly determined that a hearing on remand was necessary to develop these critical facts. *See Marshall v. Hendricks*, 307 F.3d 36, 110 (3d Cir. 2002) (". . . under *Strickland* the reviewing court must consider whether counsel's performance was substandard by employing a specific inquiry into what counsel did and why, and comparing that to what the [defendant] urges should have been done; such an inquiry cannot rest on generalized assumptions.").

ARGUMENT

Established Ethical Rules, Practice Guidelines, Common Law Principles, and Constitutional Jurisprudence Provide the Prevailing Professional Norms Under Which the Reasonableness of Counsel's Performance Should Be Judged.

Although the record is currently silent regarding defense counsel's investigation and communication with Landrigan prior to Landrigan's sentencing, the standards to be applied to those undiscovered facts are well-established, fundamental principles governing the attorney-client relationship. Having firmly planted historical roots in the common law governing fiduciary and agency relationships, the applicable professional norms require a lawyer to be competent and diligent. In turn, these broad duties demand that lawyers investigate facts and inform, advise and develop a relationship of trust and confidence with their clients.

A. Presently Prevailing Professional Norms, As Well As Those Prevailing Professional Norms at the Time of Landrigan's Sentencing, Require Lawyers to Conduct a Reasonable Investigation and Inform the Client Regarding Client Decisions.

At the time of Landrigan's sentencing in 1990, the ABA Model Rules of Professional Conduct adopted by the Arizona Supreme Court provided that lawyers had ethical duties to be competent and diligent and to communicate with their clients. *See* ARIZONA RULES OF PROF'L CONDUCT 1.1, 1.3, 1.4 (1990). In interpreting these duties, Arizona courts have repeatedly recognized that lawyers have obligations to investigate facts and inform the client. *See In re Curtis*, 908 P.2d 472, 478 (Ariz. 1995) (finding a violation of the lawyer's duty of competence where counsel "did not attempt a thorough review of the matter"); *In re Wolfram*, 847 P.2d 94, 101 (Ariz. 1993) (finding that defense counsel violated the rule requiring client communication where lawyer failed to keep client informed about the status of the criminal trial and thereby prevented client from participating in important decisions); *In re Cardenas*, 791 P.2d 1032, 1034 (Ariz. 1990) (finding that counsel's failure to identify and explain important matters to client violated lawyer's obligation to communicate with client); *Baird v. Pace*, 752 P.2d 507, 511 (Ariz. 1987) ("Even as to doubtful matters, an attorney is expected to perform sufficient research to enable him to make an informed and intelligent judgment . . . ."); *State v. Fisher*, 730 P.2d 825, 828 (Ariz. 1986) (finding that defense counsel acted incompetently because he failed to "properly investigate or utilize vital evidence and

testimony"); *State v. Schultz*, 681 P.2d 374, 376 (Ariz. 1984) (noting that counsel has a "duty to investigate" and "explore all avenues leading to facts relevant to the merits of the case"); *State v. Lopez*, 412 P.2d 882, 886 (Ariz. App. 1966) ("It is counsel's duty to investigate carefully all defenses of fact and law that may be available to the defendant . . . .").

1. Prevailing Professional Norms Require a Lawyer to Investigate.

In 1990, codifications of the rules governing Arizona lawyers required lawyers to be competent and diligent. *See* ARIZONA RULE OF PROF'L CONDUCT 1.1 (requiring lawyers to provide "competent representation" which demands "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"); ARIZONA RULE OF PROF'L CONDUCT 1.3 (1990) (requiring lawyers to act with "reasonable diligence and promptness in representing a client"); *see also* ABA MODEL RULES OF PROF'L CONDUCT 1.1, 1.3. Those same requirements remain in full force today, both in Arizona and in more than 45 jurisdictions that follow the ABA Model Rules on competence and diligence. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52 (stating that lawyers must "exercise the competence and diligence normally exercised by lawyers in similar circumstances").

In practice, a competent and diligent representation requires adequate preparation and research by the lawyer. *See State v. Fisher*, 730 P.2d 825, 828 (Ariz. 1986) (finding that defense counsel acted

incompetently because he failed to "properly investigate or utilize vital evidence and testimony"); *State v. Schultz*, 681 P.2d 374, 376 (Ariz. 1984) (noting that counsel has a "duty to investigate" and "explore all avenues leading to facts relevant to the merits of the case"); *see also* ABA MODEL RULE OF PROF'L CONDUCT 1.1 cmt 5. The comments to the 1990 version of Arizona's Rule of Professional Conduct 1.1 explain that "adequate preparation" demands "inquiry into and analysis of the factual and legal elements of the problem." ARIZONA RULE OF PROF'L CONDUCT 1.1 cmt. (1990). In addition, the comments explain that adequate preparation in a given matter will vary depending upon what is at stake in the litigation such that matters of significant consequence demand more attention and preparation. *Id.*; *see also* ABA MODEL RULE OF PROF'L CONDUCT 1.3 cmt 1. The 1990 version of Arizona Rule 1.3 describes diligent preparation as allowing counsel to "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." ARIZONA RULE OF PROF'L CONDUCT 1.3 cmt. (1990).

If one applies the foregoing principles to a capital case like Landrigan's, the ethically mandated measures that a diligent defense lawyer was required to pursue had to include a reasonable investigation of mitigating circumstances that had the potential to save the client from a death sentence. *See State v. Carriger*, 645 P.2d 816, 819 (Ariz. 1982) (noting that, at a minimum, defense counsel has an obligation to prepare and present "available pertinent mitigating evidence" at the penalty phase); ABA STANDARD FOR CRIMINAL JUSTICE 4-4.1 (2d ed. 1980) ("It is the duty of the lawyer

to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction."); ABA STANDARD FOR CRIMINAL JUSTICE 4-4.1 cmt. (2d ed. 1980) ("The lawyer has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. . . . Investigation is essential to fulfillment of these functions.").[3]

Far from being able to adjudicate whether Landrigan's lawyer fulfilled his investigative duties under the particular circumstances of this case (or to assess the consequences of any failure on his part to fulfill those duties), a court handicapped by the present undeveloped record cannot even define those duties with the "concreteness, definiteness, [and] certainty" demanded for responsible constitutional adjudication. *Rescue Army v. Municipal Court*, 331 U.S. 549, 573 (1947). The current record indicates only that Landrigan's counsel apparently subpoenaed two of Landrigan's family members to testify at the penalty phase; the record is bare of any facts regarding whether counsel took any action to investigate the other types of mitigating evidence that Landrigan now claims should have been presented on his behalf and if not, why not. Without these crucial facts, a court cannot make a fully informed decision about the issues central to the merits of Landrigan's Sixth Amendment claim.

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[3] The Third Edition of the ABA Standards of Criminal Justice, which is currently in effect, enumerates the same duty to investigate. *See* ABA STANDARD FOR CRIMINAL JUSTICE 4-4.1 (3d ed. 1993); ABA STANDARD FOR CRIMINAL JUSTICE 4-4.1 cmt. (3d ed. 1993).

2. Prevailing Professional Norms Require a Lawyer to Inform and Advise the Client Regarding Client Decisions.

At the time of Landrigan's sentencing, the Arizona Supreme Court had adopted Rule 1.4 of the ABA Model Rules of Professional Conduct, which required lawyers to inform and advise their clients. *See* ARIZONA RULE OF PROF'L CONDUCT 1.4 (1990) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); ARIZONA RULE OF PROF'L CONDUCT 1.4 cmt. (1990) ("The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued . . . ."); ARIZONA RULE OF PROF'L CONDUCT 2.1 (1990) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice."); *see also* ABA MODEL RULE OF PROF'L CONDUCT 1.4 cmt. ("Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation . . . . The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued . . . ."). Similarly, the ABA Standards for Criminal Justice apply the same requirement in the criminal defense context, providing that "[d]efense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." ABA STANDARD FOR CRIMINAL JUSTICE

4-3.8 (3d ed. 1993). In practice, these basic requirements have been endorsed by courts across the country for more than a century.[4]

Again, the current record in this case is insufficiently developed to determine whether Landrigan's lawyer met these long-recognized duties of consultation and informed advice, or even to specify the precise nature of those duties under the particular circumstances of Landrigan's prosecution. Without knowing the extent of counsel's investigation of potentially mitigating factors, the extent to which he informed Landrigan about the fruits of that investigation and the value of such mitigation evidence, or even the extent to which counsel discussed with Landrigan that counsel planned to subpoena the family members, the court does not have the necessary facts - the adequate record that the remand ordered by the Ninth Circuit would provide - to measure counsel's performance. To rule on the merits of Landrigan's Sixth Amendment claim without a solid factual basis could only serve to inject uncertainty into the standards that the criminal defense bar must rely upon to conform their conduct.

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[4] *See e.g., Baker v. Humphrey*, 101 U.S. 494, 500 (1879) ("It is the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client receive."); *Wood v. McGrath, North, Mullin & Kratz*, 589 N.W. 2d 103, 114 (Neb. 1999) ("A lawyer should exert his or her best efforts to ensure that the decisions of a client are made only after the client has been informed of relevant considerations."); *People v. Mattson*, 336 P.2d 937, 949 (Cal. 1959) ("The right of an accused to the services of an attorney contemplates that the attorney will investigate possible defenses or alternative procedures and advise the accused of his conclusions . . . .").

B. The Fiduciary Obligations of Lawyers Reflected in Contemporary Professional Norms Derive from a Deeply-Rooted Common Law Tradition.

The fiduciary duties reflected in the foregoing professional norms governing attorney-client relations have historical roots that predate and exist independently of modern rules of professional conduct and practice guidelines. *See* MALLEN & SMITH, 2 LEGAL MALPRACTICE, § 14.1 (2006); *Vallinoto v. DiSandro*, 688 A.2d 830, 845 (R.I. 1997) (noting that the fiduciary obligations of lawyers existed before rules of professional conduct and require lawyers to competently represent their clients' interests and diligently carry out all the obligations owed to them).

The fiduciary duties of lawyers toward their clients derive in part from the common-law of agency. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 146 (1986). In an early 20th century treatise on agency law, Floyd R. Mechem noted that the attorney-client relationship was one of "trust and confidence" and further, that "the rules which govern the conduct of other persons standing in fiduciary relations, apply with special force to the dealings of the attorney with his client." FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY § 2188 (1914).

In explaining these principles of fiduciary law and their application to the attorney-client relationship, the treatise clearly articulates duties of competence and diligence and references a lawyer's obligation to inform the client and pursue all reasonable and proper

avenues toward obtaining relief for the client. For instance, with respect to counsel's duty to inform and advise the client, Mechem reports that "it is always the duty of an agent . . . to fully inform the principal of all facts relating to the subject-matter of the agency which come to the knowledge of the agent, and which it is material for the principal to know for the protection of his interests." *Id.* § 1207.

Furthermore, with respect to the obligations of diligence and investigation, the common law provided that "it [was] the duty of the attorney, who undertakes the collection or enforcement of a claim, to prosecute that object with reasonable diligence" and that any such attorney must "not permit the claim to be lost through his negligent inattention to his duty." *Id.* § 2197 (citing *Stevens v. Dexter*, 55 Ill. 151 (1870); *Goodman v. Walker*, 30 Ala. 482 (1857); *Cox v. Sullivan*, 7 Ga. 144 (1849); *Fitch v. Scott*, 3 How. (Miss.) 314 (1839); *Gilbert v. Williams*, 8 Mass. 51 (1811)). This undertaking to exercise reasonable diligence required the attorney to "sue out all process, *mesne* as well as final, which may be necessary to effect the object" of the representation." *Id.* § 2197. In other words, for centuries, the common law has recognized the basic obligations of the lawyer to inform, investigate, and carry out his representation with competence and diligence.

Regarding the lawyer's duties of diligence and preparation, George Sharswood explained that a party has a right "to have every view presented to the minds of the judges" who decide their cases, and further, that "the office of the counsel is to assist [clients] by doing that which the client in person, from want of learning,

experience, and address, is unable to do in a proper manner." GEORGE SHARSWOOD, PROFESSIONAL ETHICS 26 (1854). Simply put, counsel had a duty to put his expertise and knowledge to work preparing and investigating "all fair arguments arising on the evidence." *Id.* at 44. Moreover, as to a lawyer's duty to inform and advise the client, Sharswood summarized the obligations of counsel in observing that "[i]t is in some measure the duty of counsel to be the keeper of the conscience of the client; not to suffer him, through the influence of his feelings or his interest, to do or say anything wrong in itself, and of which he would himself afterwards repent." *Id.* at 46. In other words, Sharswood recognized that lawyers have an obligation to use their experience and knowledge not only to investigate the client's cause, but also to inform the client as to the consequences of the client's decisions and advise him or her against short-sighted or uninformed choices.

In sum, the fundamental obligations of lawyers to act diligently and competently are centuries-old concepts that, in practice, require lawyers to investigate, inform and advise their clients.[5] These obligations, which lie at the heart of Landrigan's habeas petition, also have a long tradition of being strictly guarded and enforced by the courts. In light of this historical context, the professional norms dictated

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[5] Indeed, contemporary scholars have traced the fiduciary-type obligations of attorneys back even further to medieval times in England and elsewhere. *See, e.g.*, Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385 (2004); Jonathan Rose, *The Legal Profession in Medieval England: A History of Regulation*, 48 SYRACUSE L. REV. 1 (1998).

by more contemporary rules of professional conduct, practice guidelines and case law are best understood as no more than the current reflections of deeply-rooted, traditional and fundamental fiduciary principles.

C. Because These Ethical Questions Cannot Be Answered on the Present Record, Remand is Required.

The duties of competence, diligence, and communication required defense counsel to fulfill several obligations relating to the penalty phase of Landrigan's trial. First, counsel had a duty to conduct a reasonable investigation into potentially mitigating circumstances prior to the sentencing hearing. Second, he had a duty to inform Landrigan about the progress of that investigation and the various kinds of mitigating evidence potentially available to him. Third, before acquiescing in any client decision to forego presentation of any mitigating evidence, counsel had a duty to advise Landrigan about the importance of mitigating evidence and the consequences of presenting or not presenting it.

On the present record, one cannot tell what minimum steps Landrigan's lawyer needed to take in order to satisfy these ethical obligations, still less whether he took them. The entire course of dealings between Landrigan and the lawyer remains obscure and unexamined in the record presented to the Ninth Circuit and this Court. The colloquy reflected in the transcript at Landrigan's sentencing hearing raises important questions, but does not answer them. Under those circumstances, the Ninth Circuit's decision to

remand the case to the District Court for development of an adequate factual record was the wise and necessary precondition for responsible Sixth Amendment adjudication. Only by such a remand can the district court and any subsequent appellate court obtain the facts necessary for a fully informed specification and determination of the constitutional issues raised by Landrigan's ineffective-assistance claim.

CONCLUSION

For the foregoing reasons, the ABA respectfully submits that the judgment of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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No. 05-1575

FILED
NOV 15 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

DORA B. SCHRIRO, Director,
Arizona Department of Corrections,

Petitioner,

v.

JEFFREY TIMOTHY LANDRIGAN a.k.a.
BILLY PATRICK WAYNE HILL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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CAPITAL CASE

QUESTION PRESENTED

Did the Ninth Circuit err by finding that the state court's analysis of Landrigan's ineffective assistance of counsel claim was objectively unreasonable under *Strickland* v. *Washington*, 466 U.S. 668 (1984), notwithstanding the absence of any contrary authority from this Court in cases in which the defendant impedes counsel's attempts to investigate and present mitigating evidence?

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INTEREST OF AMICI CURIAE

All decisions of this Court concerning the question of whether trial counsel's assistance meets constitutional standards are of interest to Amici States, as Amici States are responsible for defending presumptively valid state court judgments against post-conviction claims that trial counsel provided ineffective assistance. The decision below represents a substantial departure from this Court's test for assessing whether trial counsel has competently investigated mitigating evidence in a death penalty case. Under the standard applied in the decision below and by some other lower courts, the heavy measure of deference due to trial counsel's decisions has been replaced with a virtually irrebuttable presumption that any failure to discover any potentially mitigating evidence constitutes deficient performance. Amici States' interests will therefore be substantially affected by the resolution of this issue. This brief is submitted in support of petitioner by Amici States through their Attorneys General in accordance with Rule 37.4 of the Rules of the Supreme Court of the United States.

SUMMARY OF ARGUMENT

In *Strickland* v. *Washington*, this Court warned against intrusive post-trial inquiry into trial counsel's performance at the penalty phase of a capital case, and specifically cautioned against the promulgation of rigid checklists for assessing that performance. Notwithstanding this clear warning, intrusive post-trial inquiry and lengthy checklists have proliferated in the lower courts. Further, some lower court decisions, including the decision below, have set a standard for performance that requires

perfect investigations; those decisions have found to be constitutionally deficient any investigation by trial counsel that does not unearth everything discovered later by post-conviction counsel. Amici States urge this Court to reaffirm the principle that such hindsight review is improper and forms no legitimate basis for questioning the validity of capital sentencing proceedings.

Based upon a fundamental misreading of this Court's decisions in *Williams* v. *Taylor*, *Wiggins* v. *Smith*, and *Rompilla* v. *Beard*, the court below has created a standard under which any failure by a trial counsel to unearth any potentially mitigating evidence, even when such failure is based upon the statements and actions of the defendant that indicate such evidence need not be investigated and could be harmful to the case in mitigation, constitutes deficient performance.

Other courts, including the Third and Sixth Circuits, have erroneously promulgated specific and lengthy guidelines, based upon the idealized investigation recommended by the American Bar Association. Those courts have held that these guidelines define trial counsel's minimum duties and that failure to fulfill these guidelines in any particular renders trial counsel's performance per se deficient.

The Third, Sixth, and Ninth Circuits' exaggerated views of trial counsel's duties cannot be reconciled with this Court's plain statements in *Strickland* and other cases that trial counsel reasonably may limit the scope of potential investigation based upon the defendant's statements or actions, or based on the tactical determination that a particular course might be unproductive or that another course might be more fruitful.

Under the *Strickland* standard for determining whether trial counsel's performance complies with the Constitution, counsel's decision-making is entitled to respect and a heavy measure of deference. Proper application of the correct rule in the instant case requires careful consideration of a key (if not dispositive) fact that the decision below ignored: the defendant's active interference with the investigation and presentation of the case in mitigation.

ARGUMENT

THIS COURT SHOULD REJECT THE UNREALISTIC AND NON-DEFERENTIAL STANDARD ADOPTED BY THE NINTH CIRCUIT AND SOME OTHER LOWER COURTS FOR REVIEWING COUNSEL'S PERFORMANCE IN THE INVESTIGATION OF MITIGATION EVIDENCE

Respondent Landrigan actively interfered with his trial attorney's attempts to investigate and present mitigating evidence. Landrigan made scornful statements in open court about trial counsel's mitigation arguments that served only to support the case in aggravation. Further, Landrigan instructed his mother and his ex-wife not to cooperate in the investigation or presentation of the case in mitigation. Not only did this prevent trial counsel from eliciting their testimony, it also prevented trial counsel from gathering evidence he sought on the question of whether Landrigan suffered from mental deficits.

In holding that trial counsel provided unconstitutionally deficient representation, the decision below failed to

properly consider Landrigan's actions and statements, which were the most significant factors affecting trial counsel's decision-making. The decision below would annul *Strickland's* requirement that trial counsel's decisions be judged based upon the circumstances in which trial counsel found himself. Other lower courts have joined the Ninth Circuit in abandoning this mandated deference to trial counsel's decision-making, and have instead imposed a rule in which *any* failure to discover *any* even potentially mitigating evidence, even when that failure is prompted by the actions or statements of the defendant, is per se deficient performance. This new rule is irreconcilable with the deference required by this Court's clearly-established rule for assessing trial counsel's performance announced in *Strickland*; it is further irreconcilable with the doubly-deferential review of a state court decision rejecting a claim of ineffective assistance of counsel.

1. In *Strickland* v. *Washington*, 466 U.S. 668, 690 (1984), this Court presciently warned:

> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges.

This proliferation has come to pass, due to a trend of decreasingly deferential post-trial inquiry into attorney performance, and the adoption by some lower courts of detailed guidelines for evaluating trial counsel's performance.

a. The decision below, and recent decisions of other courts, interpret three recent decisions of this Court, *Rompilla* v. *Beard*, 545 U.S. 374, 125 S. Ct. 2456 (2005), *Wiggins* v. *Smith*, 539 U.S. 510 (2003), and *Williams* v.

Taylor, 529 U.S. 362 (2000), as re-writing the standard for assessing whether trial counsel competently investigated and presented mitigating evidence in a death penalty case. According to these lower courts, *Rompilla*, *Wiggins* and *Williams* have articulated a standard in which trial counsel, to perform effectively, must investigate and discover all potentially mitigating evidence that might be presented before making any tactical decisions regarding what penalty-phase defense to present. *Landrigan* v. *Schriro*, 441 F.3d 638, 643 (9th Cir. 2006); see *Dickerson* v. *Bagley*, 453 F.3d 690, 693-95 (6th Cir. 2006); *Outten* v. *Kearney*, 464 F.3d 401, 417-18 (3d Cir. 2006).

Contrary to the views of these lower courts, *Rompilla*, *Wiggins* and *Williams* did not alter *Strickland's* well-settled standard. They simply applied *Strickland* in fact-specific assessments of trial counsels' performance. *Rompilla*, 545 U.S. at ___, 125 S. Ct. at 2469-70 (O'Connor, J., concurring) ("today's decision simply applies our long-standing case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under *Strickland*"); *Wiggins*, 539 U.S. at 522 (applying the "'clearly established' precedent of *Strickland*"); *Williams*, 529 U.S. at 390 (merits of claim "are squarely governed by our holding in *Strickland*").

b. Notwithstanding this Court's plain statements, the decision below reflects the view that this Court has somehow altered the standard for what constitutes the minimum performance required by the Constitution in the investigation of mitigation evidence in preparation for the penalty phase of a capital case. In the Ninth Circuit's view, this alteration permits the promulgation of an idealized standard of performance, in which anything short of a

perfect investigation falls below the constitutional minimum.

Thus, the decision below cites *Caro* v. *Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999), for the proposition that "all relevant mitigating evidence be unearthed for consideration," *Landrigan*, 441 F.3d at 643. This statement is irreconcilable with this Court's clear directive in *Strickland*, 466 U.S. at 690-91, that, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Nor are these Ninth Circuit decisions compatible with this Court's holding in *Burger* v. *Kemp*, 483 U.S. 776, 794 (1987), that, even if trial counsel "could well have made a more thorough investigation than he did . . . counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment."

The decision below also cites *Silva* v. *Woodford*, 279 F.3d 825, 840 (9th Cir. 2002), which held that a defense attorney's duty to investigate is "virtually absolute, regardless of a client's expressed wishes." See *Landrigan*, 441 F.3d at 647. This rule is irreconcilable with *Strickland's* clear directive that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's statements or actions." 466 U.S. at 691. Thus, contrary to reason and common sense (as well as the plain statement in *Strickland*), the decision below has removed any consideration of the defendant's statements or actions from trial counsel's decision-making regarding potential avenues of investigation.

c. The Ninth Circuit is not alone in its unduly expansive view of the standards applicable to defense attorneys at the penalty phase of death penalty cases. Some lower courts have transformed the ABA Standards for Criminal Justice ("the ABA Standards") and the more-recently issued ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("the ABA Guidelines") into the very "checklist" *Strickland*, 466 U.S. at 688, warned against. See *Rompilla*, 125 S. Ct. at 2473 (Kennedy, J., dissenting) ("while we have referred to the ABA Standards for Criminal Justice as a useful point of reference, we have been careful to say these standards 'are only guides' and do not establish the constitutional baseline for effective assistance of counsel. . . . The majority, by parsing the guidelines as if they were binding statutory text, ignores this admonition.") This Court, however, made it clear that the references in *Rompilla, Wiggins*, *Williams* and *Strickland* to the "Defense Function" portion of the ABA Standards, and in *Rompilla* and *Wiggins* to the ABA Guidelines, were only for the purpose of obtaining *guidance* regarding the standards for assessing trial counsel's performance. *Rompilla*, 125 S. Ct. at 2466; *Wiggins*, 539 U.S. at 522-25; *Williams*, 529 U.S. at 396; *Strickland,* 466 U.S. at 688-89.

Despite this clear directive, the Court of Appeals in *Dickerson* v. *Bagley*, 453 F.3d at 693-95, for example, held that the ABA Guidelines are "the required standards of performance for counsel in capital cases regarding the investigation of mitigating circumstances" and concluded that "conducting a partial, but ultimately incomplete, mitigation investigation does not satisfy *Strickland's* requirements." Thus, in order to provide the minimum level of competence required by the Constitution, according to

Dickerson, "regardless of the expressed desires of a client," trial counsel *must* obtain and review:

- "Medical history, (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage)," even if the defendant tells trial counsel that he has never been sick a day in his life;
- "Family and social history, (including physical, sexual or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment and peer influence)," even if the defendant tells trial counsel that he grew up in a healthy, loving home;
- "[T]raumatic events such as exposure to criminal violence, the loss of a loved one or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities)," even if the defendant tells trial counsel that he has never experienced such things;
- "Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities," even if the defendant tells trial counsel that he was a straight-A student and captain of the football team;
- "Employment and training history (including skills and performance, and barriers to employability),"

> even if the defendant tells trial counsel that he had an excellent employment history.

Dickerson, 453 F.3d at 694.

And trial counsel's responsibilities do not end there. "It is necessary to locate and interview the client's family members . . . and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole officers, and others." Also, "Records—from courts, government agencies, the military, employers, etc.—can contain a wealth of mitigating evidence, documenting or providing clues to childhood abuse, retardation, brain damage, and/or mental illness, and corroborating witnesses' recollections. Records should be requested concerning not only the client, but also his parents, grandparents, siblings, and children." *Dickerson*, 453 F.3d at 694-95. *Dickerson* holds that this exhaustive list comprises "the *required* standards of performance" and that any failure to complete any aspect of this list "does not satisfy *Strickland's* requirements." 453 F.3d at 693, 695 (emphasis added). See *Keith* v. *Mitchell*, 455 F.3d 662, 683-84 (6th Cir. 2006) (Clay, J., concurring in part and dissenting in part) (the ABA Guidelines impose an "obligation" on trial counsel); *Clark* v. *Mitchell*, 425 F.3d 270, 293-94 (6th Cir. 2005) (Merritt, J., dissenting) (the Supreme Court "embraced" the ABA Standards as "a relevant standard by which to judge the reasonableness of counsel's performance").

Like the Sixth Circuit in *Dickerson*, the Third Circuit in *Outten* v. *Kearney*, 464 F.3d at 417-18, held that the ABA Guidelines define trial counsel's duty. See *Marshall* v. *Cathel*, 428 F.3d 452 (3d Cir. 2005) (the ABA Standards define, in part, "prevailing professional norms").

Similarly, in *Summerlin* v. *Schriro*, 427 F.3d 623, 629-30 (9th Cir. 2005), the Ninth Circuit embraced the ABA Standards as defining trial counsel's "duty." This reliance on the 300-plus pages in the ABA Standards and the ABA Guidelines[1] as defining trial counsel's duties are precisely the "detailed guidelines" for the examination of trial counsel's performance that "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions," and "distract counsel from the overriding mission of vigorous advocacy of the defendant's cause." *Strickland*, 466 U.S. at 689-90.

2. Not only is the lower courts' expansion of trial counsel's duties inconsistent with this Court's rulings, it is also bad policy. The deficiencies in performance identified in *Williams* (counsel's failure to seek available records regarding the defendant's troubled upbringing was based upon counsel's mistaken belief that state law barred access to such records), *Wiggins* (counsel did not investigate or present evidence in mitigation of which he was aware and about which he told the jury), and *Rompilla* (counsel possessed but inexcusably failed to review evidence he knew would be presented in aggravation) were identified in a straight-forward application of *Strickland*, without the need to alter that well-settled test. This Court should reject

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[1] The "Defense Function" portion of the ABA Standards (chapter 4) was first approved by that body in 1971, was revised in 1980, and was revised again in 1993; the third (and current) edition is 129 pages long. The ABA Guidelines were originally adopted in 1998, and were revised in 2003; they now consist of 178 pages of combined "black-letter" guidelines and commentary. American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003).

the lower courts' decisions altering the *Strickland* test, which has proven to be a sensitive and reliable instrument for the detection of deficiencies. These decisions would replace *Strickland* with a mechanical list that, as *Strickland* itself explains, runs the risk of ratifying deficient performance because it fulfills the checklist, or of condemning competent performance because it does not fulfill some artificial set of criteria.

Further, if the ABA-mandated "no stone unturned" approach that *Landrigan*, *Dickerson*, *Outten*, and the other cases have adopted is the *minimum* standard required by the Constitution, it is unclear what an *excellent* lawyer would do. If the Constitution requires that trial counsel interview "virtually" every person who ever knew the defendant or any member of the defendant's family, and review every scrap of paper ever associated with the defendant or his family, what more investigation could trial counsel who wished to exceed that minimum undertake?

Condoning this unrealistic standard will only exacerbate a troubling trend. Claims of ineffective assistance of counsel in the investigation and presentation of mitigation evidence have become the staple of state and federal habeas corpus litigation, principally because of the willingness of some federal courts to second-guess individual decisions of trial counsel. From 1992 to 1998, claims of ineffective assistance of counsel at the penalty phase were raised in 83 percent of federal habeas corpus cases involving state death penalty judgments. Price Waterhouse Coopers, COST OF PRIVATE PANEL REPRESENTATION IN FEDERAL CAPITAL HABEAS CORPUS CASES FROM 1992 TO 1998, p. VI-83. Further, such claims were viewed as the "most significant factor" contributing to the cost of federal habeas corpus

litigation. *Id.* The ubiquity of such claims is inconsistent with *Strickland's* "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . ." 466 U.S. at 689. Clearly, *Strickland's* warning that ineffective assistance of counsel claims would proliferate if hindsight imposition of checklist evaluations of trial counsel's decisions are permitted has gone unheeded.

3. Proper application in this case of the appropriately deferential *Strickland* standard requires careful consideration of a key fact to which the decision below turns a blind eye: Landrigan's interference with trial counsel's investigation and presentation of mitigating evidence.[2] Landrigan instructed his birth mother and ex-wife not to testify, thus preventing trial counsel from obtaining evidence that would have assisted the case in mitigation. And although trial counsel tried to argue that the aggravating factors were not as severe as the prosecution indicated, "'[e]ach of counsel's feints in the mitigation direction brought a statement from Landrigan that painted an even bleaker picture and made matters even worse.'" *Landrigan*, 441 F.3d at 652 (Bea, J., dissenting), quoting *Landrigan* v. *Schriro*, 272 F.3d 1221, 1226 (9th Cir. 2001). By failing to take into proper account the effect of Landrigan's actions and statements on trial counsel's decision-making, the decision below assessed

[2] The decision below states, "[t]here is no indication in the current record that Landrigan in any way prohibited or impeded [trial counsel's] ability to investigate or assemble a mitigation defense." *Landrigan*, 441 F.3d at 647. However, under *Strickland*, Landrigan's direction to his birth mother and ex-wife not to testify, which precluded trial counsel from investigating and developing evidence regarding Landrigan's social history and mental health, provided support for trial counsel's decision not to further investigate those areas.

trial counsel's performance under a standard that was incompatible with *Strickland*.

The Third, Sixth and Ninth Circuits would ignore direction from the defendant in evaluating trial counsel's decision-making regarding potential avenues for investigation. *Outten*, 464 F.3d at 417-18 ("Counsel's duty to investigate is not negated by the expressed desires of a client."); *Dickerson*, 453 F.3d at 693-95 ("The duty to investigate exists regardless of the expressed desires of a client."); *Landrigan*, 441 F.3d at 647 ("a lawyer's duty to investigate is virtually absolute, regardless of a client's expressed wishes"). The unrealistic standard reflected in these decisions, further, would require trial counsel to unearth all evidence that could potentially be presented in mitigation before making strategic choices regarding what evidence to present. This standard should be repudiated because it shows no deference—let alone the "heavy measure of deference" required by *Strickland*—to trial counsel's decision-making as regards investigation of the case in mitigation. In place of *Strickland*-mandated deference, this standard presumes to be unreasonable any decision by trial counsel to refrain from a particular course of investigation, even at the explicit direction of the defendant, if, years later and after the expenditure of enormous time and resources, it can be demonstrated that something of even marginal utility to the case in mitigation might have been discovered.

In *Yarborough* v. *Gentry*, 540 U.S. 1, 8 (2003) (per curiam), this Court explained that the "Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." In the same case, the Court held that judicial review of a defense attorney's performance is "highly deferential—and doubly deferential

when it is conducted through the lens of federal habeas." 540 U.S. at 6. In some circuits, this deference apparently no longer applies when a court is assessing trial counsel's decision regarding the investigation of mitigating evidence in a death penalty case.

Lower courts have misconstrued this Court's holdings in *Williams, Wiggins* and *Rompilla*—which, as this Court has previously stated, did not alter the *Strickland* test. This Court should restore *Strickland's* emphasis on deference to trial counsel's decision-making to its rightful place in the assessment of whether a defendant received the effective assistance of counsel in the investigation and presentation of mitigating evidence in death penalty cases guaranteed by the Constitution.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

Dated: November 13, 2006

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No. 05-1575

FILED
NOV 13 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DORA B. SCHRIRO, DIRECTOR
ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

vs.

JEFFREY TIMOTHY LANDRIGAN, a.k.a,
BILLY PATRICK WAYNE HILL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When the state courts have found that the defendant in a capital case directed his attorney not to present evidence in mitigation and that finding of fact was reasonable based on the evidence before the state court, does 28 U. S. C. § 2254(d)(2) require denial of the ineffective assistance claim without further litigation?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

As in several other recent cases, the Ninth Circuit's opinion substitutes its own debatable inferences to set aside the conclusion reached by the state court. The en banc court's decision is contrary to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the integrity of state court convictions, and the principle that the state courts stand on equal footing to the inferior federal courts. Further, this decision impedes the finality of criminal convictions and is contrary to the interests of justice and public safety that CJLF seeks to advance.

SUMMARY OF FACTS AND CASE

In 1982, Jeffrey Landrigan attacked his "best friend" Greg Brown from behind, stabbing him to death. *Landrigan* v. *Stewart*, 272 F. 3d 1221, 1226-1227 (CA9 2001). Four years later, while incarcerated for murdering Brown, Landrigan stabbed a fellow inmate 14 times because he

[1] This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

"got in an argument" with him. *Id.*, at 1227. Three years later, Landrigan broke out of prison and escaped to Arizona. *Id.*, at 1223. He convinced Chester Dyer to take him back to his apartment where the two had sex, and Dyer called a friend to arrange a job for Landrigan. Two days later, Arizona police found Dyer fully clothed, face down on his bed, with a pool of blood at his head. An electrical cord hung around his neck. There were facial lacerations and puncture wounds on the body. A half-eaten sandwich and a small screwdriver lay beside it. Blood smears were found in the kitchen and bathroom. Partial bloody shoeprints were on the tile floor. *Ibid.* (citing *State* v. *Landrigan*, 176 Ariz. 1, 2-3, 859 P. 2d 111, 113 (1993)). Landrigan also left an ace of hearts "carefully propped on Dyer's back," ransacked his apartment, and stole his paycheck. See *ibid.*

Landrigan was convicted of first-degree murder and sentenced to death. His attorney attempted to present mitigating evidence during the sentencing phase, but Landrigan objected. Landrigan frustrated his lawyer's attempts to paint him as a caring husband, see *id.*, at 1227, and, when his lawyer implied that he had killed Greg Brown in self-defense, Landrigan "interjected with a more inculpatory version of that prior killing." *State* v. *Landrigan*, 859 P. 2d, at 118. Landrigan also prohibited his lawyer from calling his girlfriend as a mitigating witness, and stopped his birth mother from testifying that she used drugs and alcohol while pregnant with him. See *ibid.*

Understanding the potential conflict between his duty to put on mitigating evidence and his duty to follow his client's instructions, Landrigan's attorney explained to the sentencing judge that he was ready to present evidence but that Landrigan would not permit it. *Landrigan* v.

Stewart, 272 F. 3d, at 1225. Landrigan affirmed that he had instructed his lawyer not to raise any mitigating circumstances, and told the court that there were no mitigating circumstances "as far as I'm concerned." *Ibid.* In another exchange, he stated, "If you want to give me the death penalty, just bring it right on. I'm ready for it." *State* v. *Landrigan*, 859 P. 2d, at 117.

The state trial judge sentenced Landrigan to death, finding him to be

> "somewhat of an exceptional human being. It appears that Mr. Landrigan is a person who has no scruples and no regard for human life and human beings and the right to live and enjoy life to the best of their ability, whatever their chosen lifestyle might be. Mr. Landrigan appears to be an amoral person." *Ibid.*

On direct appeal, the Arizona Supreme Court rejected each of his contentions, and found his ineffective assistance claim to be meritless. *Id.*, at 118. Landrigan then filed a state postconviction petition, claiming that he would have cooperated had his lawyer raised the fanciful mitigation theory that Landrigan was genetically predisposed to kill people. *Landrigan* v. *Stewart*, 272 F. 3d, at 1228. But the state habeas judge – the same judge who presided over Landrigan's sentencing – found that Landrigan's "statements at sentencing belie his new-found sense of cooperation." *Id.*, at 1228, n. 3. That is, she found that Landrigan was lying. She also found that "defendant instructed his attorney not to present *any* evidence at the sentencing hearing. . . . " Appendix F to Petition for Writ of Certiorari 3 (emphasis in original).

The state supreme court denied review, and a federal district court rejected his federal habeas petition. *Id.*, at

1224. A unanimous panel of the Ninth Circuit affirmed, *id.*, at 1231, but a limited en banc court[2] reversed and remanded for an evidentiary hearing. See *Landrigan* v. *Schriro*, 441 F. 3d 638 (CA9 2006) (en banc). The en banc court held that the state courts had unreasonably held that Landrigan had "instructed his lawyer not to present mitigating evidence." *Id.*, at 646-647. According to the en banc majority, the state supreme court and the state habeas judge – the same judge who presided over Landrigan's sentencing – had taken "the sentencing judge's questions" and Landrigan's answers "out of context." *Id.*, at 646. As applied to the superior court finding, this is a holding that Judge Hendrix had taken *her own* questions out of context. The en banc court also conducted its own review of the record, determined that Landrigan was prejudiced, and remanded the case for an evidentiary hearing.

SUMMARY OF ARGUMENT

In substituting its judgment for the state courts, the Ninth Circuit failed to accord the deference required under AEDPA. Where the state court has made a finding of fact that precludes a claim, the threshold inquiry the federal courts need to make is whether that finding was an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U. S. C. § 2254(d)(2). If not, relief cannot be granted on that claim, and there is nothing more to litigate on it.

[2] Because of its size, the Ninth Circuit rarely sits truly en banc. See Ninth Circuit Rule 35-3.

Here, the state courts found that Landrigan had "instructed his attorney not to present any evidence at the sentencing hearing." *Landrigan* v. *Schriro*, 441 F. 3d 638, 646 (CA9 2006). And while it may be possible to read the black and white record to find an ambiguity, this finding easily meets AEPDA's "highly deferential" standard of review. *Lindh* v. *Murphy*, 521 U. S. 320, 333, n. 7 (1997).

With this decision, the Ninth Circuit has effectively changed "unreasonable" to "possible to read the record differently." This is just the kind of Monday-morning quarterbacking that Congress was trying to eliminate with AEDPA. The state court's reasonable finding of fact that Landrigan instructed his attorney not to present mitigating evidence should end this matter, and there is no need for discovery or evidentiary hearings. The term "unreasonable" does not mean "debatable" or even "incorrect." This Court should clarify that an unreasonable factual determination is one which wholly lacks support in the record. If there is room for debate about a state court's finding, then it is not unreasonable.

ARGUMENT

The fundamental error underlying the Ninth Circuit's en banc decision in this case is evident from the opening sentence of the majority's opinion. "In this appeal, we consider whether petitioner, Jeffrey Timothy Landrigan, received ineffective assistance of counsel in the penalty phase of his capital murder trial." *Landrigan* v. *Schriro*, 441 F. 3d 638, 641 (CA9 2006). But this is an AEDPA case, which means that the appropriate threshold inquiry is merely into whether the decisions of the Arizona courts

were "unreasonable." 28 U. S. C. § 2254(d). A negative answer to this question is dispositive under AEDPA. If the state court's decision is not unreasonable, then Landrigan's claim is precluded, and that is the end of the matter. It does not matter if the Arizona courts' decisions were questionable, debatable, or even incorrect. This is especially so for the factual determinations of the state courts. For if it is inappropriate for the inferior federal courts to second-guess the *legal* judgments of coequal state courts, see, *e.g.*, *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 58-59, n. 11 (1997), how much less appropriate is it for the *factual* findings of the state trial courts who are in a superior position to find the facts?

I. If a state court makes a reasonable finding of fact that is dispositive, further action in the case is inappropriate.

The Ninth Circuit's determination that Landrigan is entitled to an evidentiary hearing misses an essential point. Here, the state courts held that Landrigan had instructed his lawyer not to present mitigating evidence during his sentencing phase and rejected his claim that he would have cooperated in presenting other mitigating evidence. If that finding was reasonable, Landrigan's claim is precluded and there is nothing else to do but deny the petition for relief. A decision to effectively concede the penalty phase is the client's decision to make, see *Florida* v. *Nixon*, 543 U. S. 175, 187 (2004) (noting defendant's authority to make waivers of basic trial rights), and failure

to override it is *per se* not ineffective.[3] But in Part II-A-3 of its opinion, see *Landrigan* v. *Schriro*, 441 F. 3d 638, 647-648 (CA9 2006), the en banc majority contends that the federal courts must conduct a *post hoc* inquiry into Landrigan's counsel's investigation even if the state court finding that Landrigan instructed his attorney not to present evidence was reasonable. This is certainly mistaken. So long as the state's finding that Landrigan instructed his attorney not to present evidence was not unreasonable, the petition must be denied.

To hold otherwise would conflict with the purposes of AEDPA. One of AEDPA's principal purposes is to "reduce delays in the execution of state and federal criminal sentences, particularly in capital cases. . . . " *Woodford* v. *Garceau*, 538 U. S. 202, 206 (2003). As Senator Dole noted in introducing the bill, one of the reasons for habeas reform was to make sure criminals will "get what they deserve – punishment that is swift, certain, and severe." 141 Cong. Rec. S5841 (daily ed. April 27, 1995) (statement of Sen. Dole). These purposes were repeatedly emphasized as AEDPA made a difficult journey through the Senate. A week before the bill passed, Senator Specter explained on the floor that the bill was aimed at changing the circumstances where the "death penalty [was] applied and then there are delays of up to 17 years while the cases languish in the Federal courts." 142 Cong. Rec. S3470 (daily ed. April 17, 1996) (statement of Sen. Specter). He also noted that the "lengthy appeals process in the Federal court has, in effect, defeated the deterrent effect of the

[3] At the very least, the state court's conclusion to this effect is reasonable, and that is sufficient under AEDPA. This point is addressed in Part II of the State's brief.

death penalty" and that the penalty needed to be "certain and reasonably swift." *Ibid.*; see also Shepherd, Murders of Passion, Execution Delays, Capital Punishment, 33 J. Legal Studies 283 (2004). During another debate over AEDPA's habeas reform provisions, Senator Hatch explained that the provisions were important because "these people try to get into the Federal courts where they figure they have more liberal judges who are going to find any excuse they can to overturn a death penalty." 142 Cong. Rec. S3362 (daily ed. April 16, 1996) (statement of Senator Hatch).

This Court has also recognized that "Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." *Williams (Terry)* v. *Taylor*, 529 U. S. 362, 404 (2000) (opinion of the Court quoting Justice Stevens' opinion). It has also recognized that section 2254(d) was one of the critical methods that "Congress used to advance these objectives." *Garceau*, 538 U. S., at 206. Requiring an evidentiary hearing to investigate whether counsel's investigation was adequate would be nothing more than an academic exercise in light of the state court's finding that Landrigan did not want to admit any mitigating evidence. As this Court has explained, Congress "inten[ded] to avoid unneeded evidentiary hearings in federal habeas corpus," *Williams (Michael)* v. *Taylor*, 529 U. S. 420, 436 (2000), because, at some point, the State must be allowed to exercise its "'sovereign power to punish offenders.'" *McCleskey* v. *Zant*, 499 U. S. 467, 491 (1991) (quoting *Murray* v. *Carrier*, 477 U. S. 478, 487 (1986)).

Another principal objective of AEDPA is "to further the principles of comity, finality, and federalism." *Williams*, 529 U. S., at 436. Allowing endless evidentiary

hearings on issues that will not affect the ultimate resolution of the case is both a poor use of judicial resources and an insult to the coequal state judiciary. See *Sawyer* v. *Smith*, 497 U. S. 227, 241 (1990); see also *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U. S. 574, 587-588 (1999). During the debates that led to the passage of AEDPA, one Senator explained that "the present system of review is demeaning to the State courts and pointlessly disparaging to the efforts to comply with Federal law in criminal proceedings" because it presumed that state courts were "incapable of applying Federal law, or unwilling to do so." 141 Cong. Rec. S7821 (daily ed. June 7, 1995) (statement of Sen. Nickles). But state courts are not only competent, they are equal to the lower federal courts when it comes to interpreting and applying the Constitution. The federal courts may not pour over their opinions looking for mistakes like a teacher grading exams.

Further, these delays are no theoretical problem. The "average time spent in prison for a death row inmate in 2004 was ten years and two months." *Allen* v. *Ornoski*, 435 F. 3d 946, 954 (CA9 2006) (citing U. S. Dept. of Justice, Bureau of Justice Statistics, Capital Punishment, 2004, p. 11 (Nov. 2005)). Despite having the most prisoners on death row in 2004, California did not even manage to execute one of the 637 that year. Indeed, California has only managed to execute 10 inmates since 1977, but 43 died of other causes in that same time. See Capital Punishment, 2004, at 16. Nationwide, there were 214 inmates on death row in 2004 who had been under sentence of death for more than 20 years. See *id.*, at 14. At that time, 657 prisoners had been on death row for more than 15 years. See *ibid.*

Aside from burdening the states in their battle against crime, these delays wreak havoc on the victims' families.

John Collins, the father of a 19-year-old young woman who was brutally murdered in 1985, may have put it best when he testified before the Judiciary Committee in 1991:

> "Extended habeas corpus proceedings mean no closure to our grief, no end to our mental and emotional suffering, no end to nightmares, and no relief from the leaden weights that remain lodged in our hearts. It means we continue to bleed." 141 Cong. Rec. S7672 (daily ed. June 5, 1995) (statement of Sen. Kyl).

A woman whose husband had been killed in the Oklahoma City bombing while she was pregnant favored habeas reform because she did "not want his daughter to be in high school wondering why his killers are still on death row." 141 Cong. Rec. S7820 (daily ed. June 7, 1995) (statement of Sen. Nickles). And the wife of a Secret Service agent killed in Oklahoma City explained that her pain "would be much, much greater if the perpetrators of this crime are allowed to sit on death row for many years." *Ibid.*

Because the state courts reasonably found that Landrigan had instructed his attorney not to present any mitigating evidence, this Court must reverse the en banc decision of the Ninth Circuit. This is not a case where the defendant waived his right to present mitigating evidence because he was poorly informed as to his options. Rather, Landrigan thwarted his lawyer's efforts to introduce even the most basic mitigating evidence. Requiring an evidentiary hearing into whether his counsel did a sufficient

investigation serves no purpose in a case where the defendant was unwilling to present mitigating evidence. Under such circumstances, an evidentiary hearing into the nature of the investigation only causes needless delay, and it conflicts with the chief purpose of AEDPA to streamline habeas proceedings. It also demeans the status of the state courts and causes more needless pain for the victims and their families. This Court should therefore hold that the federal courts must deny a petition without further action where there has been a reasonable finding of fact that precludes a petitioner's claims.

II. This Court should adopt a clear definition of the term "unreasonable" for purposes of § 2254(d).

In AEDPA cases, this Court has defined what "unreasonable" isn't, rather than what it is. *Wiggins* v. *Smith*, 539 U. S. 510, 520 (2003) (a decision must be "more than incorrect or erroneous" to be unreasonable). Thus, this Court has held that unreasonable does not mean "incorrect or erroneous" but must be something "more." *Lockyer* v. *Andrade*, 538 U. S. 63, 75 (2003). This Court has further explained that it "is not enough that a federal habeas court, in its independent review of the legal question, is left with a firm conviction that the state court was erroneous." *Ibid.* (internal quotation marks omitted). *Andrade* also explained that "unreasonable" does not mean "clearly erroneous." "The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness." *Ibid.*

And while this practice of "definition by negative" is generally sufficient for most cases (and ought to be sufficient for lower courts), it lacks clear guidelines. A

well-intentioned court, in an effort to correct a perceived injustice, might "recite[] the proper standard of review" but mistakenly "substitute[] its evaluation of the record for that of the state trial court." *Rice* v. *Collins*, 546 U. S. __, 126 S. Ct. 969, 973, 163 L. Ed. 2d 824, 831 (2006). As in this case, this temptation results in a court saying "unreasonable" but applying "debatable." But a decision is not unreasonable merely because an appellate court's "generous reading" of the record presents a "reason to question" the trial court's decision. *Id.*, 126 S. Ct., at 975, 163 L. Ed. 2d, at 833.

It appears that the only "positive" definition of unreasonable that this Court has offered is the self-referential "objectively unreasonable" standard. See, *e.g.*, *Williams (Terry)* v. *Taylor*, 529 U. S. 362, 409 (2000); see also *Andrade*, 538 U. S., at 75; *Wiggins*, 539 U. S., at 521. But "objectively" does not add much as a practical matter. The "unreasonable determination of the fact" standard is the most deferential standard known to the federal courts. For while findings of fact may not be disturbed on direct review unless they are "clearly erroneous," see *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U. S. 424, 440, n. 14 (2001), the respect paid to the trial court's findings of fact must be even greater on habeas review. In other contexts, this Court has explained that the deference required under the "unreasonable" standard of review is much greater than "clearly erroneous":

> "[T]he 'clearly erroneous' standard is significantly deferential, requiring a 'definite and firm conviction that a mistake has been committed.' And application of a reasonableness standard is even more deferential than that, requiring the reviewer to sustain a finding of fact unless it is so unlikely that no reasonable

person would find it to be true, to whatever the required degree of proof." *Concrete Pipe and Products of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U. S. 602, 623 (1993) (ERISA).

Applying this same articulation of "unreasonable" to AEDPA would be consistent with this Court's past decisions. In *Rice* v. *Collins*, the lower court found an "unreasonable determination of the facts" because it concluded that "no reasonable factfinder" could have found as the trial court did. 126 S. Ct., at 974, 163 L. Ed. 2d, at 832. And though this Court rejected the circuit court's reasons for so holding, it applied the same standard: whether any reasonable person could have found as the state court did. See *id.*, 126 S. Ct., at 974-976, 163 L. Ed. 2d, at 832-834. Such a holding would eliminate, to the degree possible, the difficulty that some lower courts seem to have applying the unreasonableness standard of § 2254(d). Rather than asking "*would we* have found as the trial court did," the courts will ask "*could anyone* have found as the trial court did." This Court should make its implicit adoption of the "no reasonable person" explicit.

The explicit adoption of the "no reasonable person" standard would be consistent with this Court's long-standing practice of according "great deference" to state court findings of fact on direct appeal as well as habeas. *Hernandez* v. *New York*, 500 U. S. 352, 364 (1991) (plurality opinion); see also *id.*, at 372 (O'Connor, J., concurring); *Batson* v. *Kentucky*, 476 U. S. 79, 98 n. 21 (1986) (factual determinations, such as credibility of witness, due "great deference"); *Burden* v. *Zant*, 498 U. S. 433, 437 (1991) (*per curiam*). Even before AEDPA, former subdivision (d) of section 2254 "require[d] the federal courts to show a high measure of deference to the factfindings made by the state

courts." *Sumner* v. *Mata*, 455 U. S. 591, 597-598 (1982) (*per curiam*). On habeas review, it has never been sufficient that the federal court "simply disagree" with a state court's finding of fact. *Marshall* v. *Lonberger*, 459 U. S. 422, 432 (1983). The former subdivision (d) required a federal court to defer to a state court finding of fact unless it was not "fairly supported by the record." *Ibid.* AEDPA's "unreasonable" standard is even more deferential. Thus, the "no reasonable person" standard fits well within both AEDPA and this Court's prior habeas jurisprudence.

This inquiry into the reasonableness of state court's factual finding must be assessed "in light of the record before the court," *Miller-El* v. *Cockrell*, 537 U. S. 322, 348 (2003), not by considering evidence that was not before the state court. See, *e.g.*, *Bell* v. *Cone*, 535 U. S. 685, 697, n. 4 (2002); 28 U. S. C. § 2254(d)(2). So long as the evidence in the record could have led any reasonable trier of fact to find as the trial court did, the federal courts are precluded from granting habeas relief.

III. The state courts' determination that Landrigan would not have cooperated with counsel in presenting any mitigation defense was not unreasonable and disposes of Landrigan's habeas petition.

The Ninth Circuit's independent review of the record amounts to nothing less than a *de novo* review of the state court proceedings. It is no surprise that, upon an independent review of the black-and-white record, the court "set aside reasonable state-court determinations of fact in favor of its own debatable interpretation of the record." *Rice* v. *Collins*, 546 U. S. ___, 126 S. Ct. 969, 972, 163 L. Ed. 2d 824, 830 (2006). But, with the proper "no reasonable

person" standard in mind, this case is rather simple. The state court held that Landrigan waived his right to present mitigating evidence in the following exchange:

> "THE COURT: Mr. Landrigan, have you instructed your lawyer that you do not wish him to bring **any** mitigating circumstances to my attention?
>
> "THE DEFENDANT: Yeah.
>
> "THE COURT: Do you know what that means?
>
> "THE DEFENDANT: Yeah.
>
> "THE COURT: Mr. Landrigan, are there mitigating circumstances I should be aware of?
>
> "THE DEFENDANT: Not as far as I'm concerned." *Landrigan* v. *Stewart*, 272 F. 3d 1221, 1225 (CA9 2001) (emphasis added).

Here, it is likely that the state court's conclusion was correct and it was certainly not unreasonable. This exchange *could* be read to mean that Landrigan was only opposed to having his mother and ex-wife testify, but that is not the only "objectively reasonable" reading. It is not even the best reading. As the original Ninth Circuit panel put it, "Landrigan's position could hardly have been more plain." *Ibid.* He refused to permit his lawyer to put "any mitigating circumstances" before the court, and even objected when his lawyer proffered the evidence that he would have put on. *State* v. *Landrigan*, 859 P. 2d, at 118. The most natural reading of this colloquy, adopted by the Arizona Supreme Court and the trial court, is that Landrigan purposely chose not to put forth mitigating evidence. See *ibid.*

Given this record, the Arizona Supreme Court's determination that Landrigan "instructed his lawyer not to present any mitigating evidence" is well within AEDPA's wide boundaries. In this case, though, there is an even stronger reason for deferring to the state court-finding of fact. For when Landrigan filed his state habeas petition, it was heard by the same judge who had presided over his sentencing proceeding. *Landrigan* v. *Stewart*, 272 F. 3d, at 1228, n. 3. Landrigan argued that he would have permitted his counsel to introduce evidence that he was genetically predisposed to murder, but the state court *rejected* this claim, judging Landrigan not credible. That is, the judge who presided over both hearings found that Landrigan's "statements at sentencing belie his new-found sense of cooperation." *Ibid.* Any doubt about the "context" of Landrigan's statements to the sentencing judge are resolved by this finding.

Even in a pre-AEDPA habeas case, this Court held that "determinations of demeanor and credibility . . . are peculiarly within a trial judge's province." *Wainwright* v. *Witt*, 469 U. S. 412, 428 (1985); see also Fed. Rule Civ. Proc. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses"). Under AEDPA, they are nearly unreviewable. So long as the judge presiding at the hearings could rationally have rejected Landrigan's claim, the federal courts may not grant habeas relief.

IV. Even if Landrigan's lawyer was ineffective, Landrigan could not have been prejudiced.

Even if the state court's finding that Landrigan waived his right to present mitigation was unreasonable, this Court should affirm his sentence. Landrigan can meet neither prong of the *Strickland*[4] test, that his counsel fell below the constitutionally minimal standards or that he was prejudiced. See *Rompilla* v. *Beard*, 545 U. S. 374, 380 (2005) ("Ineffective assistance under *Strickland* is deficient performance by counsel resulting in prejudice").

This Court has held that the "Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough* v. *Gentry*, 540 U. S. 1, 8 (2003). Further, courts must "indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable." *Bell* v. *Cone*, 535 U. S. 685, 702 (2002). This review is "doubly deferential when it is conducted through the lens of federal habeas." *Yarborough*, *supra*, at 6. So long as a lawyer's representation is not the functional equivalent of having no counsel at all, the Sixth Amendment is not offended.

Here, Landrigan complains only that his lawyer's ineffective investigation deprived him of the chance to present that he was genetically predisposed to murder, which he claims was the only mitigation defense in which he was willing to cooperate. *Landrigan* v. *Stewart*, 272 F. 3d 1221, 1228 (CA9 2001) ("Landrigan's only personal

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[4] *Strickland* v. *Washington*, 466 U. S. 668 (1984).

declaration indicates that he would have cooperated in presentation of evidence on a single ground – genetic predisposition"). As the original Ninth Circuit panel put it, the theory that Landrigan ought to be excused from the death penalty because he was genetically violent is "rather exotic." *Ibid.* Indeed, while it may not be constitutionally ineffective to present the theory, see, *e.g.*, *Mobley* v. *Head*, 267 F. 3d 1312, 1318 (CA11 2001); see also *Turpin* v. *Mobley*, 269 Ga. 635, 642-645, 502 S. E. 2d 458, 465-467 (1998), it is certainly not constitutionally ineffective to fail to present it. In the first place, the theory borders on the ridiculous. Second, such evidence could well make it *more likely* that a defendant would get the death penalty, not less. See, *e.g.*, *People* v. *Franklin*, 167 Ill. 2d 1, 26, 656 N. E. 2d 750, 761 (1995) (genetic violence evidence "could have also demonstrated defendant's potential for future dangerousness"). Landrigan had already violently stabbed his best friend to death, stabbed a fellow prisoner more than a dozen times over a trivial dispute, and escaped from prison only to murder Chester Dyer in a brutal manner and for no evident reason.

"Even if some of the arguments would unquestionably have supported the defense, it does not follow that counsel was incompetent for failing to include them. Focusing on a small number of key points may be more persuasive than a shotgun approach." *Yarborough*, 540 U. S., at 7. It is entirely reasonable to conclude, as Landrigan's lawyer may have, that only the "Officer Krupke" defense, see Leonard Bernstein & Stephen Sondheim, *West Side Story*, *Gee Officer Krupke*, available at http://www.westsidestory.com/site/level2/lyrics/krupke.html (last visited October 28, 2006), was likely to do his client any good. To put on evidence that Landrigan was genetically compelled to stab

more people to death seems counterproductive; it provides even more reason to execute him. It seems extraordinarily unlikely that "prevailing professional norms" require the presentation of such a ridiculous defense.[5]

But even if Landrigan's counsel should have investigated the merits of the "born to kill" defense, there can be little doubt that Landrigan would have received the death penalty even had he thoroughly convinced the trial court of his position. Under *Strickland*, a defendant is not entitled to relief unless he can show prejudice. See, *e.g.*, *Rompilla*, 545 U. S., at 380. Here, the only reasonable probability is that the evidence Landrigan claims he wanted introduced would have made it *more* likely for him to get the death penalty, not less. His theory shows that it would be difficult, if not impossible, to deter him from extreme violence. So does his past. While incarcerated for the murder of one man, he stabbed a fellow prisoner, escaped from prison, and within two months murdered still another man. The evidence did no more than confirm that neither the public, nor even Landrigan's fellow prisoners, will be safe until he is executed.

Landrigan "failed to show remorse" and even "flaunted his menacing behavior." *State* v. *Landrigan*, 859 P. 2d, at 118. The sentencing judge found him to be "amoral" and found that he had "no regard for human life and human beings." *Id.*, at 117. The evidence that

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[5] The fact that cases are litigated for many years on claims of "mitigating" evidence that most people would find aggravating is further evidence that the *Lockett* v. *Ohio*, 438 U. S. 586 (1978) line of cases is a failure. See *Graham* v. *Collins*, 506 U. S. 461, 500 (1993) (Thomas, J., concurring). In an appropriate case, probably one on direct review, this line should be reconsidered.

Landrigan sought to introduce, such as it was, could not have aided Landrigan's cause. At best, it would have been unhelpful. At worst, it could have further cemented Landrigan's place on death row. This is doubtless why Landrigan's wild theory that he is less culpable because he is genetically predisposed to kill people does not appear to have worked in any reported case, state or federal.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

November, 2006

Respectfully submitted,

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No. 05-1575

In the Supreme Court of the United States

DORA B. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

JEFFREY TIMOTHY LANDRIGAN, AKA BILLY PATRICK WAYNE HILL

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Gore v. *Dugger*, 933 F.2d 904 (11th Cir. 1991), cert denied, 502 U.S. 1066 (1992)..... 13
Hill v. *Lockhart*, 474 U.S. 52 (1985)..... 15
Horton v. *Zant*, 941 F.2d 1449 (11th Cir.1991)..... 16
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Laws v. *Armontrout*, 863 F.2d 1377 (8th Cir. 1988)..... 13
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Miller v. *Wainwright*, 798 F.2d 426 (11th Cir. 1986) vacated on other grounds, 480 U.S. 901 (1987)..... 13

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Minnick v. *Mississippi*, 498 U.S. 146 (1990) 7
Schneckloth v. *Bustamonte*, 412 U.S. 218 (1973) 7
Simmons v. *South Carolina*, 512 U.S. 154 (1994) 13
Skipper v. *South Carolina*, 476 U.S. 1 (1986) 13
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State ex rel. Strogen v. *Trent*, 196 W. Va. 148, 155 (1996) 16
Strickland v. *Washington*, 466 U.S. 668 (1984) 2, 3, 21
Townsend v. *Sain*, 372 U.S. 293 (1963) 5
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Williams v. *Taylor*, 529 U.S. 362 (2000) 2, 4
Woodson v. *North Carolina*, 428 U.S. 280 (1976) 4
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18 U.S.C. § 3599 (g)(1) 18

TABLE OF AUTHORITIES—continued

Page(s)

MISCELLANEOUS

ABA Death Penalty Moratorium Implementation Project and the Florida Death Penalty Assessment Team, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report* (Sept. 2006) 18

ABA Death Penalty Moratorium Project and the Alabama Death Penalty Assessment Team, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* (June 2006) 19

American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) 14

American Bar Association Information Program & The Spangenberg Group, *Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial: A State-by-State Overview, 2003* (Apr. 2003) 18

Michelle E. Barnett, Stanley L. Brodsky, & Cali Manning Davis, *When Mitigation Evidence Makes a Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials*, 22 Behav. Sci. & Law 751 (2004) 25

P. Blake, J. Pincus, & C. Buckner, *Neurologic Abnormalities in Murderers*, 45 Neurology 1641 (1995) 10, 11

John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 Mich. L. Rev. 939 (March 2005) 11, 12

TABLE OF AUTHORITIES—continued

Page(s)

Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 Catholic U. L. Rev. 1169, 1192 (2004-2005)..... 11, 12

William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L. J. 1043 (1994-1995)..... 24

Bureau of Justice Statistics, U.S. Department of Justice, *Capital Punishment, 2004*, Bulletin 6 (November 2005, revised February 1, 2006),..... 9

Craig M. Cooley, *Mapping The Monster's Mental Health And Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists*, 30 Okla. City U. L. Rev. 23 (2005) 13

Mark Costanzo & Sally Costanzo, *Jury Decision Making in the Capital Penalty Phase: Legal Assumptions, Empirical Findings, and a Research Agenda*, 16 Law and Hum. Behav. 185 (1992)..... 25

Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 Behav. Sci. & Law 191 (2002)..... 8, 9, 10

Mark P. Cunningham & Mark P. Vigen, *Without Appointed Counsel in Capital Postconviction Proceedings: The Self-Representation Competency of Mississippi Death Row Inmates*, 26 Crim. Justice and Behav. 293, 300 (1999) 9, 10, 11

M. Feldman, K. Mallouh, & D.O. Lewis, *Filicidal Abuse in the Histories of 15 Condemned Murderers*, 14 Bull. Am. Acad. Psych. & Law 345 (1986) 10

TABLE OF AUTHORITIES—continued

Page(s)

D. Freedman & D. Hemenway, *Precursors of Lethal Violence: A Death Row Sample*, 50 Social Science & Medicine 1757, 1758 (2000) 10, 11

R.L. Frierson, D.M. Schwartz-Watts, D.W. Morgan, et al., *Capital Versus Noncapital Murderers*, 26 Journal of the American Academy of Psychiatry & Law 403 (1998) 9

Gallup Organization, Public Opinion Online (May 21, 2002), *available at* Lexis ACC-NO: 0404089. 26

Richard W. Garnett, *Sectarian Reflections on Lawyers' Ethics and Death Row Volunteers*, 77 Notre Dame L. Rev. 795 (2002) 12

Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538 (1998) 24, 25

Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 Santa Clara L. Rev. 547 (1995) 9

C. Lee Harrington, *Mental Competence and End-of-Life Decision Making: Death Row Volunteering and Euthanasia* 29 J. of Health Politics, Policy and Law 1109 (December 2004) 11

D. O. Lewis, J. H. Pincus, M. Feldman, et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 Am. J. Psych. 838, 840 (July 1986) 10, 11

Princeton Survey Research Associates, Public Opinion Online (June 7, 1997), *available at* Lexis ACC-NO: 0280513 26

Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, The Champion (Jan./Feb. 1999) 15

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G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness, and the Propriety of Third Party Intervention*, 74 J. Crim. L. & Criminology 860 (1983) 11

Subcommittee on Federal Death Penalty Cases, Committee Defender Services, Judicial Conference of the United States, Report, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Death Penalty Representation* (1998) 18

Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 Buff. L. Rev. 330 (Fall 1995) 9, 17, 19

Welsh S. White, *Defendants Who Elect Execution*, 48 U. Pitt. L. Rev. 853 (1986-1987) 12

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with over 10,000 national members and more than 28,000 affiliate members from every State.[1] Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. In furtherance of that mission, NACDL frequently files *amicus curiae* briefs in this Court in cases involving capital punishment (see, *e.g.*, *Carey* v. *Musladin*, No. 05-785 (Dec. 11, 2006); *Gonzalez* v. *Crosby*, 545 U.S. 524 (2005); *Dodd* v. *United States*, 545 U.S. 353 (2005); *Rhines* v. *Weber*, 544 U.S. 269 (2005); *Pliler* v. *Ford*, 542 U.S. 225 (2004)), and in cases implicating a criminal defendant's right to a fair trial (see, *e.g.*, *Crawford* v. *Washington*, 541 U.S. 36 (2004)).

The questions presented in this case relate directly to the duties of defense counsel in capital cases. NACDL has unique expertise with respect to these issues as well as a strong interest in their appropriate resolution.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has long recognized the right of a capital defendant to introduce a wide range of mitigation evidence in support of his argument against the death penalty. See *Kansas* v. *Marsh*, 126 S.Ct. 2516, 2525 (2006). The Court also has recognized and enforced a corresponding constitutional duty of defense counsel to perform a reasonable investigation to identify mitigation evidence that could potentially lessen a defendant's punishment. *Wiggins* v. *Smith*, 539 U.S. 510, 521-22 (2003); *Williams* v. *Taylor*, 529 U.S. 362, 395 (2000). Given the critical role of mitigating circumstances in the sentencing process, proper performance of this duty literally can mean the difference between life and death for the defendant.

This case involves respondent's claim that his counsel's investigation of mitigating circumstances was so inadequate that it constituted ineffective assistance of counsel under the standard of *Strickland* v. *Washington*, 466 U.S. 668 (1984). With respect to the first prong of the *Strickland* standard, petitioner did not seek review of the court of appeals' determination that respondent had presented a colorable claim that his counsel's investigation fell below prevailing professional norms. Petitioner argues instead that respondent should be denied an evidentiary hearing because he supposedly waived his right to present *any* mitigation evidence, and that waiver excuses any ineffective assistance by respondent's counsel in failing to conduct a reasonable investigation.

That argument ignores the well-settled principle that waivers of criminal trial rights guaranteed by the Constitution are valid only if they are knowing, voluntary, and intelligent. *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). A defendant cannot knowingly and intelligently waive presentation of any and all mitigation evidence without his lawyer's informed advice regarding the range of potentially mitigating evidence that might be available to him for introduction in the sentencing process and its potential impact on the sentencing deter-

mination. The en banc court of appeals properly – and unanimously – determined that such informed advice can be given only after the lawyer has conducted the reasonable investigation required by this Court's decisions.

The novel waiver standard advocated by petitioner requires no knowledge of the mitigation evidence that might be available. It also ignores the reality that capital defendants commonly are among the least capable members of society and, as a class, are most unlikely to be able to make intelligent decisions based only on general information about the mitigation process. They need advice of counsel based on the reality of their particular case in order to have any chance of comprehending the choices available to them in a proceeding that will determine whether they will live or die. The waiver standard should support, rather than undermine, the important values protected by the Sixth and Eighth Amendments.

With respect to *Strickland*'s prejudice prong, the court of appeals correctly concluded that respondent's showing was sufficient to require an evidentiary hearing. The anemic investigation by respondent's counsel failed to unearth a number of mitigating factors that weigh against a death sentence, including proof of respondent's "organic brain dysfunction," his exposure to alcohol and drugs in utero, his abandonment by his birth parents, his biological family's history of violence, and his own potential genetic predisposition to violence. The reaction of nine judges below to this evidence – as well as empirical studies of jury behavior – provide strong support for the conclusion that respondent has established a colorable claim of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

ARGUMENT

RESPONDENT IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

Recognizing that "death is a punishment different from all other sanctions in kind rather than degree," this Court has held that the Constitution requires an individualized determination that death is the appropriate sentence. *Woodson* v. *North Carolina*, 428 U.S. 280, 303-04 (1976). "Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background * * * may be less culpable than defendants who have no such excuse." *Wiggins*, 539 U.S. at 535 (quoting *Penry* v. *Lynaugh*, 492 U.S. 302, 319 (1989)).

The Court accordingly has held that the Eighth Amendment requires "a broad inquiry into all relevant mitigating evidence to allow an individualized determination" of the appropriateness of the death penalty. *Buchanan* v. *Angelone*, 522 U.S. 269, 276 (1998). The sentencing process must "permit [the judge or jury imposing sentence] to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." *Marsh*, 126 S.Ct. at 2524-25. The judge or jury pronouncing sentence may "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original).

To vindicate this critically important right, the Court has reaffirmed repeatedly in recent years that defense counsel has a constitutional duty to perform a reasonable investigation in order to identify mitigation evidence that might lessen the defendant's punishment. *Wiggins*, 539 U.S. at 522; *Williams*,

529 U.S. at 395-96. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Wiggins*, 539 U.S. at 521.

This case involves a claim that respondent's counsel failed to conduct the reasonable investigation of mitigating circumstances required by the Constitution. Such claims are analyzed under the familiar two-part *Strickland* test, which requires both deficient performance by counsel, as measured against "an 'objective standard of reasonableness,' 'under prevailing professional norms'" and prejudice to the defendant from that deficient performance. *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 688).

The issue here is not whether respondent should prevail on his ineffective assistance claim, but only whether respondent has adduced sufficient evidence on each prong of the *Strickland* standard to justify an evidentiary hearing in the district court.

This Court has made clear that an evidentiary hearing is required whenever the habeas applicant has advanced a colorable claim and resolution of a factual dispute is necessary for a determination regarding the habeas applicant's claim. *Townsend* v. *Sain*, 372 U.S. 293, 312 (1963) ("allege[d] facts which, if proved, would entitle [the habeas applicant] to relief"); cf. *Miller-El* v. *Cockrell*, 537 U.S. 322, 327 (2003) (denial of certificate of appealability under 28 U.S.C. § 2253 improper because "jurists of reason could conclude that the issues presented are adequate to deserve encouragement to proceed further").[2] That standard is clearly satisfied here.

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[2] This is not a case in which 28 U.S.C. § 2254(e)(2) bars an evidentiary hearing, because the record shows that respondent pursued his claims diligently in state court. Pet. App. A8.

A. An Uninformed Waiver Cannot Excuse A Failure By Defense Counsel To Conduct The Constitutionally-Required Investigation Of Mitigation Evidence.

The certiorari petition in this case did not seek review of the unanimous determination of eleven judges below that respondent presented a colorable claim of deficient performance by his counsel. The majority stated that "counsel did little to prepare for the sentencing aspect of the case," that "the initial investigation *did* reveal potential mitigation evidence, but that evidence was not developed," and that respondent accordingly had "made a colorable claim that he did not receive effective assistance of counsel in his sentencing." Pet. App. A10, A11, A7 (emphasis in original). The dissenting judges agreed "with the majority's conclusion that counsel's limited investigation of [respondent's] background fell below the standards of professional representation." *Id.* at A22 (Bea, J., dissenting, joined by Callahan, J.).

Petitioner instead advances a waiver theory: respondent supposedly waived his right to present *any and all* mitigation evidence and that waiver excused any deficient performance by counsel under *Strickland*, rendering an evidentiary hearing unnecessary.

The court of appeals relied on two independent grounds in rejecting petitioner's position. First, it held that respondent did not intend to waive presentation of all mitigation evidence, but only of the two types of mitigation evidence described by his counsel. Pet. App. A14-A15. Second, it held that even if respondent had intended to waive his right to introduce *any* mitigation evidence, respondent proffered evidence sufficient to require an evidentiary hearing on his claim that his waiver was ineffective because it was not knowing and intelligent. *Id.* at A17.

We focus on the second aspect of the court of appeals' holding. Even if petitioner can show that the court of appeals erred in its determination regarding the scope of respondent's

waiver – and we believe its determination should be upheld given the record in this case – the court of appeals was plainly correct in concluding unanimously that there is sufficient evidence to necessitate a hearing concerning the effectiveness of the waiver.

The standard for waiver of criminal trial rights guaranteed by the Constitution is well-established – the waiver must be knowing, intelligent, and voluntary. Substantial evidence indicates that respondent's waiver could not satisfy this standard because respondent knew nothing about the range of potential mitigation evidence to which the waiver supposedly applied. We submit that a capital defendant needs the advice of counsel, informed by counsel's reasonable investigation of mitigating circumstances, in order to make a knowing and intelligent waiver. Because there is strong evidence that the waiver here did not satisfy that standard, the court of appeals properly ordered an evidentiary hearing.

1. A Capital Defendant's Waiver Of The Right To Present Any Mitigation Evidence At Sentencing Is Effective Only If It Is Knowing, Intelligent, And Voluntary.

"'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights"; to be effective, a waiver must be knowing, intelligent and voluntary. *Zerbst*, 304 U.S. at 464 (citation omitted). This standard governs any decision by a defendant "to forego a right constitutionally guaranteed to protect a fair trial." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 236 (1973). The Court has applied *Zerbst* "in many contexts where a State bears the burden of showing a waiver of constitutional criminal procedural rights." *Minnick* v. *Mississippi*, 498 U.S. 146, 159-60 (1990) (Scalia, J., dissenting). See, *e.g.*, *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969) (right to trial by jury; to be free from compelled self-incrimination; and to confront adverse witnesses); *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966) (right to

confront adverse witnesses); *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 275-80 (1942) (right to trial by jury).

As with these other constitutional rights, the *Zerbst* standard here must take account of the specific facts and circumstances in which the waiver issue occurs. Accordingly, we turn next to a discussion of the context in which the issue of waiver of presentation of mitigation evidence typically arises.

2. *The Standard For Determining Whether A Waiver With Respect To Mitigation Evidence Is Knowing And Intelligent Should Reflect The Practical Realities Of The Death Penalty Context.*

Capital defendants as a group are among the least capable – and most damaged – members of American society.[3] They typically are poor, uneducated, of below average intelligence, psychologically disturbed and/or mentally ill, and products of violent family backgrounds. Defendants with these characteristics are likely to have considerable difficulty understanding the concept of mitigation evidence, the multiplicity of forms that mitigation evidence may take, and the significance of particular evidence in sentencing determinations. This reality should inform the Court's decision regarding the circumstances in which a defendant may make an effective waiver.

The mean IQ of death-row inmates is well below average, and roughly 30% are, at best, borderline mentally re-

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[3] The best summary of the scholarly literature on this subject is Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 Behav. Sci. & Law 191 (2002) (hereinafter "Cunningham & Vigen 2002"). This paper attempts to draw broader conclusions from the available demographic data, prison data, and 13 clinical studies that have been conducted on particular subsets of the death-row population.

tarded.[4] More than 52% have less than a high-school education, and studies show that those with some high-school experience have a functional literacy well below their grade level.[5] One detailed assessment of 44 death-row inmates in Mississippi, for example, concluded that, on average, the inmates scored at roughly the 10th percentile in terms of intelligence (as measured by "verbal IQ"),[6] with 84% at or below the 6th grade level in reading comprehension.[7] In addition to their intellectual handicaps, capital defendants are also overwhelmingly poor – approximately 90% are indigent at time of arrest.[8]

Death row inmates typically have suffered extensive physical and sexual abuse.[9] One study of 16 inmates found that every single one had suffered violence in the home dur-

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[4] Cunningham & Vigen 2002, *supra* note 3, at 199; R.L. Frierson, D.M. Schwartz-Watts, D.W. Morgan, et al., *Capital Versus Noncapital Murderers*, 26 Journal of the American Academy of Psychiatry & Law 403, 406 (1998).

[5] Bureau of Justice Statistics, U.S. Department of Justice, *Capital Punishment, 2004*, Bulletin 6 (November 2005, revised February 1, 2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cp04.pdf; Cunningham & Vigen 2002, *supra* note 3, at 199-200.

[6] Mark P. Cunningham & Mark P. Vigen, *Without Appointed Counsel in Capital Postconviction Proceedings: The Self-Representation Competency of Mississippi Death Row Inmates*, 26 Crim. Justice and Behav. 293, 300 (1999) (hereinafter "Cunningham & Vigen 1999").

[7] *Id.* at 301.

[8] Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 Buff. L. Rev. 330, 333 (Fall 1995); see also Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 Santa Clara L. Rev. 547, 563 (1995).

[9] Cunningham & Vigen 2002, *supra* note 3, at 202.

ing childhood,[10] and a separate study found evidence of "extraordinary physical and/or sexual abuse" in 13 out of 15 individuals examined.[11] A broader study of individuals awaiting trial or sentencing for murder found similar results – 84% had documented histories of physical abuse, and 32% had histories of sexual abuse.[12] Additional examinations have shown that large numbers of death row inmates have suffered severe head injuries, which often lead to significant neurological impairment.[13] High rates of substance abuse among the parents of such inmates – as high as 57%, according to one Mississippi study – undoubtedly play a role in these patterns of violence and mistreatment.[14]

Mental health problems also are frequent among capital defendants. The leading survey of academic research on death row inmates concluded that all studies that have investigated the psychological functioning of such inmates have found high rates of psychological disorders.[15] Precise estimates of the prevalence and extent of mental illness vary, despite general agreement that the scope of the problem is wide. One study of death-row inmates estimates that 5-10%

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[10] D. Freedman & D. Hemenway, *Precursors of Lethal Violence: A Death Row Sample*, 50 Social Science & Medicine 1757, 1758 (2000).

[11] M. Feldman, K. Mallouh, & D.O. Lewis, *Filicidal Abuse in the Histories of 15 Condemned Murderers*, 14 Bull. Am. Acad. Psych. & Law 345, 348 (1986).

[12] P. Blake, J. Pincus, & C. Buckner, *Neurologic Abnormalities in Murderers*, 45 Neurology 1641, 1644 (1995).

[13] D. O. Lewis, J. H. Pincus, M. Feldman, et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 Am. J. Psych. 838, 840 (July 1986); Cunningham & Vigen 1999, *supra* note 6, at 305-306; Freedman & Hemenway, *supra* note 10, at 1762.

[14] Cunningham & Vigen 1999, *supra* note 6, at 305.

[15] Cunningham & Vigen 2002, *supra* note 3, at 200.

of such inmates are "seriously" mentally ill.[16] Specific conditions among these inmates vary, though paranoia and schizophrenia seem especially common.[17] In many cases, these mental health deficiencies have been traced to physiological dysfunction and abnormalities in the brain.[18]

The combination of limited intellectual ability, histories of physical and sexual abuse, and mental health problems suggest that in many cases capital defendants have limited capacity to make rational choices concerning their own defense strategies. This point is underscored by the phenomenon of death-penalty "volunteers" – capital defendants who actively bring on their own death sentences by either asking for execution or refusing to mount an effective defense or appeal.[19] According to one study, approximately 12% of those executed between 1977 and 2003 have been willing volunteers.[20] Of these, approximately 77% suffered from mental illness.[21]

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[16] Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 Catholic U. L. Rev. 1169, 1192 (2004-2005).

[17] Freedman & Hemenway, *supra* note 10, at 1761-62; Cunningham & Vigen 1999, *supra* note 6, at 305; Blake, Pincus, & Buckner, *supra* note 12, at 1643-44.

[18] Lewis, Pincus, Feldman, et al., *supra* note 13, at 840-44; Blake, Pincus, & Buckner, *supra* note 12, at 1642-44 & 1645-46; Freedman & Hemenway, *supra* note 10, at 1762.

[19] For the best overviews of this phenomenon, *see* G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness, and the Propriety of Third Party Intervention*, 74 J. Crim. L. & Criminology 860 (1983); John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 Mich. L. Rev. 939 (March 2005).

[20] Blume, *supra* note 19, at 939-940.

[21] *Id.* at 962-63, 989-96; see also C. Lee Harrington, *Mental Competence and End-of-Life Decision Making: Death Row Volunteer-*

Significantly, defendants who initially "volunteer" frequently change their minds.[22] The changeability of "volunteer" decisions reinforces the conclusion that capital defendants can make intelligent waiver decisions only if they are fully informed of the potential mitigating circumstances and their import – and in a way that they can comprehend.

The difficult personal circumstances of capital defendants of course do not excuse criminal activity. But they do establish that these defendants find it very difficult to understand the nature, purpose, and potentially varied sources of mitigation evidence – particularly in cases, such as this one, in which some of the evidence may be complex and scientific in nature.[23]

3. A Knowing, Intelligent, And Voluntary Waiver Of Presentation Of All Mitigation Evidence Can Occur Only If The Defendant Has Received The Advice Of Counsel Based On Counsel's Reasonable Investigation.

Given the crucial role that mitigation evidence plays in the capital sentencing process, the wide variety in the types of evidence that may be used to argue for mitigation, and capital defendants' likely difficulty in comprehending the role and scope of mitigation evidence, the Court should require that a defendant receive the advice of counsel, based on that lawyer's reasonable investigation, before the defendant can waive presentation of all mitigation evidence. That is the

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ing and Euthanasia 29 J. of Health Politics, Policy and Law 1109, 1132-34 (December 2004).

[22] Bonnie, *supra* note 16, at 1189-92; Richard W. Garnett, *Sectarian Reflections on Lawyers' Ethics and Death Row Volunteers*, 77 Notre Dame L. Rev. 795, 801 (2002); Welsh S. White, *Defendants Who Elect Execution*, 48 U. Pitt. L. Rev. 853, 854-55 (1986-1987); Blume, *supra* note 19, at 940.

[23] See generally Amended Memorandum Regarding Merit Claims, J.A. at 126-27.

only way to ensure that a defendant's waiver truly will be knowing and intelligent and that the waiver standard will not be invoked routinely as a means of circumventing the investigation requirement.

A wide variety of information may constitute powerful mitigation evidence depending on the facts of a particular case.[24] Some recognized mitigating factors include family history (*Eddings* v. *Oklahoma*, 455 U.S. 104, 114 (1982)); underdeveloped intellect and immaturity (*Burger* v. *Kemp*, 483 U.S. 776, 789 n.7 (1987)); favorable prospects for rehabilitation (*Miller* v. *Wainwright*, 798 F.2d 426, 430-31 (11th Cir. 1986), vacated on other grounds, 480 U.S. 901 (1987)); poverty (*Armstrong* v. *Dugger*, 833 F.2d 1430, 1433 (11th Cir. 1987)); military service (*Laws* v. *Armontrout*, 863 F.2d 1377, 1389-90 (8th Cir. 1988)); cooperation with authorities (*Foster* v. *Strickland*, 707 F.2d 1339, 1347 (11th Cir. 1983)); character (*Simmons* v. *South Carolina*, 512 U.S. 154, 163 (1994)); prior criminal history (*ibid.*); mental capacity (*ibid.*); incapacity due to drugs or alcohol (*Gore* v. *Dugger*, 933 F.2d 904 (11th Cir. 1991) (per curiam), cert denied, 502 U.S. 1066 (1992)); and good behavior while awaiting trial (*Skipper* v. *South Carolina*, 476 U.S. 1, 4-5 (1986)).

It is inconceivable, particularly in view of all of the disabilities just described, that capital defendants generally would be able to absorb the large number of categories of possible mitigation evidence, determine which of those types of evidence might be available in a particular case, and assess how that evidence might affect the sentencing decision maker – including the possible interactions of various types of mitigation evidence with each other and with the evidence introduced during the first phase of the trial. The defendant might

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[24] See generally Craig M. Cooley, *Mapping The Monster's Mental Health And Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists*, 30 Okla. City U. L. Rev. 23, 43-48 (2005).

not be aware of much of the evidence that might be available to him; he almost certainly would have no idea of its potential impact on the sentencing determination. And, without undertaking an investigation, his counsel likely would not be able to provide any useful advice on these questions. Following investigation, counsel can make the possibility of mitigation real to her client by explaining it in terms of a defendant's own life history. That will equip the defendant to make an informed decision regarding the presentation of such evidence.

Moreover, some potentially mitigating evidence is complex and scientific in nature (see generally J.A. 126-27), and may require substantial development during counsel's investigation. As in the instant case, a capital defendant may be completely unaware that such evidence is available to him.

Finally, a number of categories of well-recognized mitigation evidence relate to personal matters that potentially are very embarrassing to the defendant. As the American Bar Association *Guidelines for the Appointment and Performance of Death Penalty Cases* puts it:

> Counsel should bear in mind that much of the information that must be elicited for the sentencing phase investigation is very personal and may be extremely difficult for the client to discuss. * * * Obtaining such information [like childhood sexual abuse] typically requires overcoming considerable barriers, such as shame, denial, and repression, as well as other mental or emotional impairments from which the client may suffer.[25]

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[25] American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Sec. 10.7 cmt. (2003), *available at* http://www.abanet.org/deathpenalty/resources/docs/2003Guidelines.pdf.

One veteran capital litigator has noted that mitigation evidence often includes the "darkest, most shameful and intimate secrets of the client's family."[26]

Capital defendants may be unable or unwilling even to consider, let alone to assess accurately, the possible beneficial impact of such information. Often they are not aware of the information; even if they are, they may not volunteer it to their counsel to obtain advice regarding its significance. A defendant may so clearly perceive the down-side of presenting deeply personal evidence that he may decide impulsively against presentation. Counsel must be aware of the mitigating information that may be available in order to advise the defendant regarding the potentially beneficial effects of presentation of the information – that it may be the defendant's *only* chance to avoid death – so that the defendant can balance those benefits against the more obvious adverse consequences.

This Court should account for the difficult realities facing death penalty defendants by ensuring that defendants may waive presentation of mitigation evidence only if they are armed with the relevant critical information – advice from their attorney based on the results of his reasonable investigation. That will ensure that a defendant can make an informed decision with respect to what is, quite literally, a life-and-death decision.

This approach is consistent with the Court's recognition in *Hill* v. *Lockhart*, 474 U.S. 52, 58 (1985), that ineffective assistance of counsel in conjunction with a defendant's decision to waive the jury trial right by pleading guilty may render that waiver ineffective under the *Zerbst* standard. A number of lower courts have relied on *Hill* in holding that a

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[26] Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, The Champion (Jan./Feb. 1999), *available at* http://www.nacdl.org/public.nsf/ChampionArticles/99jan04?-OpenDocument.

guilty plea may be vitiated if counsel conducted a constitutionally inadequate investigation prior to advising the defendant with respect to the plea. See, *e.g.*, *Dando* v. *Yukins*, 461 F.3d 791, 800 (6th Cir. 2006) ("the failure to investigate undermined the knowing and voluntary nature of [the defendant's] plea"); *United States* v. *Kauffman*, 109 F.3d 186 (3d Cir. 1997); *Agan* v. *Singletary*, 12 F.3d 1012, 1018 (11th Cir. 1993) (even though defendant wished to plead guilty, "counsel must still make an independent examination of the facts and circumstances and offer an informed opinion to the accused as to the best course to follow"); *Ex Parte Del Briggs*, 187 S.W. 3d 458, 470 (Tex. Crim. App. 2005); *State* v. *Henderson*, 322 Mont. 69, 76 (2004); *State ex rel. Strogen* v. *Trent*, 196 W. Va. 148, 155 (1996). The same principle should apply to the critical decision whether to waive of presentation of mitigation evidence.

Of course, as this Court has made clear, the attorney's duty to investigate is subject to reasonable limits. The investigation of potential mitigation evidence that an attorney must undertake is the investigation that is reasonable under the circumstances. "'[S]trategic choices made after less than complete investigation are reasonable'" if "'reasonable professional judgments support the limitations on investigation.'" *Wiggins*, *539* U.S. at 533 (quoting *Strickland*, 466 U.S. at 689). See also *Blanco* v. *Singletary*, 943 F.2d 1477, 1500 (11th Cir. 1991) (holding counsel ineffective for failing to conduct a reasonable investigation because counsel's failure "was not a result of a tactical choice"); *Horton* v. *Zant*, 941 F.2d 1449, 1462 (11th Cir.1991) (finding a strategic decision impossible where trial counsel failed to "investigate his options and make a reasonable choice between them"). The approach that we propose does not alter the attorney's obligation; it simply ensures that the defendant's decision will be informed by the views of his lawyer based upon the results of the reasonable investigation.

Some lower courts have concluded that a colloquy between the court and the defendant can provide the basis for a knowing and intelligent waiver in the absence of a reasonable investigation by counsel; others have refused to find an effective waiver absent a reasonable investigation by counsel.[27] We submit that, in the absence of advice of counsel based on a reasonable investigation, an in-court colloquy is not sufficient to constitute an effective waiver.

A colloquy at most could apprise the defendant of the general purposes of mitigation evidence and explain in the abstract how such evidence may affect sentencing decisions. By definition, a generic colloquy cannot provide a defendant with any sense of how particular mitigation evidence may affect his particular case. Given the capital defendant's situation and the likely individual characteristics of these defendants, it is highly unlikely that a defendant presented with abstract information will be able by himself to make a judgment about the appropriate decision. He needs the advice of counsel, based on the information gleaned from counsel's reasonable investigation, in order to make a knowing and intelligent judgment about this very critical issue.

Moreover, there is a danger that in-court colloquies could be used as a convenient means of avoiding the sometimes resource-intensive process of conducting investigation and rendering professional advice – especially in view of the severe practical limitations on the defense. Approximately 90% of capital defendants are indigent, and as a result rely upon the state to provide them with defense counsel.[28] Un-

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[27] Compare, *e.g.*, *Zagorski v. State*, 983 S.W.2d 654, 659-60 (Tenn. 1998) (defendant can make knowing, intelligent, and voluntary waiver in the absence of investigation) and *Battenfield v. Gibson*, 236 F.3d 1215, 1229-33 (10th Cir. 2001) (waiver in the absence of investigation was not knowing or intelligent).

[28] Vick, *supra* note 8, 333-34.

fortunately, those systems often do not provide the resources needed to develop an appropriate defense.

For example, Congress in the 1990s mandated an hourly rate of $125 for defense attorneys in *federal* capital cases, because it believed that level of compensation was necessary to ensure competent representation. See 18 U.S.C. § 3599 (g)(1).[29] The most recent comprehensive study of hourly fees paid to private attorneys representing *state* capital defendants, conducted in 2003, found that the rates paid in all or parts of 13 States were set at *less than half the federal rate*, and in some states total fees were capped at less than $13,000 for an entire capital case.[30]

The same dearth of resources extends to funds for investigating mitigating circumstances and retaining outside experts. In the Florida's First Judicial District, for example, indigent defendants are permitted to spend only $500 on investigators for the entire capital trial, with an additional $625 available for a psychological expert.[31] Indeed, one possible

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[29] A subcommittee of the Judicial Conference of the United States found this rate to be minimally adequate when it was set more than eight years ago. Subcommittee on Federal Death Penalty Cases, Committee Defender Services, Judicial Conference of the United States, Report, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Death Penalty Representation* (1998), *available at* http://www.uscourts.gov/dpenalty/-1COVER.htm.

[30] American Bar Association Information Program & The Spangenberg Group, *Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial: A State-by-State Overview, 2003*, Table 1-11 (Apr. 2003), *available at* http://www.abanet.org/-legalservices/downloads/sclaid/indigentdefense/compensation-ratescapital2002-narrative.pdf.

[31] ABA Death Penalty Moratorium Implementation Project and the Florida Death Penalty Assessment Team, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report* 156 (Sept. 2006), *available at*

explanation for the anemic investigation of mitigating circumstances in the present case is the $350 ceiling on funds available to defense counsel for that purpose.[32]

The Court's decisions with respect to ineffective assistance of counsel claims provide important guidance for lawyers representing capital defendants regarding the contours of their professional obligations. Allowing a pro forma colloquy to substitute for advice of counsel based on a reasonable investigation, combined with these practical realities, threatens to produce a regime in which colloquies become the rule and reasonable investigations the exception, notwithstanding the critical role that mitigation evidence plays in ensuring fair and accurate administration of the death penalty.

Moreover, although the Court's focus under the Sixth and Eighth Amendments is ensuring appropriate protection for the defendant's rights to effective representation and to be free of cruel and unusual punishment, the facts we have just discussed implicate broader concerns as well. Americans justifiably are proud of our justice system, and the values of fairness and equal treatment that it embodies. This Court should not sanction a legal regime more likely to produce results inconsistent with these values and therefore diminish citizens' respect for the entire judicial system.

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As the en banc court of appeals unanimously concluded, respondent has made a sufficient showing to require an evidentiary hearing on whether the waiver here was effective.

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http://www.abanet.org/moratorium/assessmentproject/florida/FloridaReportEmbargoed9.13.doc; see also ABA Death Penalty Moratorium Project and the Alabama Death Penalty Assessment Team, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Alabama Death Penalty Assessment Report* 112-16 (June 2006), *available at* http://www.abanet.org/moratorium/assessmentproject/alabama/finalreport.doc; Vick, *supra* note 8, at 392.

[32] J.A. 246-47 (Declaration of Mickey McMahon).

Petitioner cannot dispute before this Court the court of appeals' holding that respondent presented enough evidence to warrant a hearing on the adequacy of his counsel's investigation. Because a waiver of all mitigation evidence cannot be knowing and intelligent unless the defendant has the benefit of advice of counsel based on a constitutionally-adequate investigation, that showing also is sufficient to call into question the validity of respondent's waiver.

Even if the Court were to conclude, contrary to our submission, that a colloquy also may provide a defendant with sufficient information about mitigation evidence to allow an effective waiver, the colloquy here on its face did not provide sufficient evidence to satisfy that standard. The record does not come close to establishing that respondent understood the importance of mitigation evidence and how it could affect his punishment. The record does not demonstrate that respondent even comprehended his right to have mitigation evidence presented. Nor does it show his understanding of the wide range of possible evidence – beyond the testimony of his family members – that might have been available for presentation on his behalf. Indeed, the colloquy provided respondent with far less information than a number of State courts require for an effective waiver.[33] Under this approach

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[33] See, *e.g.*, *Wallace* v. *State*, 893 P.2d 504, 512-513 (Ok. Crim. App. Ct. 1995) (establishing a detailed seven-point set of procedures to confirm an effective waiver of presentation of mitigation evidence); *Koon* v. *Dugger*, 619 So.2d 246, 250 (Fla. 1993) (requiring counsel to explain on the record the potential mitigation evidence that could be presented and that he has discussed the matter fully with the defendant, thereby establishing a complete record of defendant's waiver); *Zagorski*, 983 S.W.2d at 660 (requiring "determination on the record whether the defendant understands this right and the importance of presenting mitigation evidence" and inquiring "of both the defendant and counsel whether they have discussed the importance of mitigation evidence, the risks of

too, therefore, the case should be remanded for an evidentiary hearing.[34]

B. Respondent's Showing Of Prejudice Also Is Sufficient To Require An Evidentiary Hearing.

This Court should not disturb the Ninth Circuit's conclusion that respondent also is entitled to an evidentiary hearing to determine whether he can establish a "reasonable probability" that his counsel was so ineffective as "to undermine confidence in the outcome" of the hearing. *Strickland*, 466 U.S. at 694.

The prejudice element of *Strickland* plays a key role in determining the extent of the deterrent effect of post-trial ineffective assistance claims. To the extent the prejudice bar is set high, it insulates inadequate representation against attack and lessens the deterrent effect. To the extent it is set too

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foregoing the use of such evidence, and the possibility that such evidence could be used to offset aggravating circumstances").

[34] Petitioner refers in passing to "clearly established law" (Br. 27), apparently in an attempt to argue that federal habeas relief is precluded by 28 U.S.C. § 2254(d)(1). That contention is plainly wrong. All of the legal principles relevant to respondent's claim are clearly established: the requirements for an effective waiver of constitutional protections applicable to criminal defendants (in *Zerbst* and subsequent decisions); the standard for ineffective assistance of counsel (in *Strickland*); and the potential effect of ineffective assistance on waiver decisions (in *Hill*).

This case is therefore entirely different from *Carey* v. *Musladin*, No. 05-785 (Dec. 11, 2006), where this Court had articulated a standard for potentially prejudicial "state sponsored courtroom practices" but had "never applied that test to spectators' conduct." Slip op. 5. The Court further observed that "part of [that] legal test * * * suggests that [it applies] * * * only to state-sponsored practices." *Ibid.* Rather, the situation here is identical to the one in *Wiggins*, in which the Court observed that because it previously had identified the *Strickland* standard it could grant relief based on misapplication of that standard. *Wiggins*, 539 U.S. at 520-22.

low, it may promote excessive post-trial litigation. Given the realities of legal assistance to capital defendants discussed above, the Court should take care not to set the prejudice bar too high, thereby insulating against attack – based on a necessarily speculative standard – errors that might have affected the outcome of the trial.

In reaching its conclusion, the Ninth Circuit had, by its own account, a "significant amount" of mitigation evidence to work with. Pet. App. A19. Counsel's anemic investigation had failed to unearth and present a number of mitigating factors that weighed against a death sentence. That evidence included proof of respondent's "organic brain dysfunction," his exposure to alcohol and drugs in utero, his abandonment by his birth parents, his biological family's history of violence, and his own potential genetic predisposition to violence.[35] All of this evidence supports the conclusion that, as one medical expert who examined respondent put it:

> [Respondent's] actions did not constitute a lifestyle choice in the sense of an individual operating with a large degree of freedom, as we have come to define free will. The inherited, prenatal, and early developmental factors severely impaired [his] ability to function in a society that expects individuals to operate in an organized and adaptive manner, taking into account the actions and consequences of their behaviors and their impact on society and its individual members.

[35] Pet. App. A18-A19. This evidence goes far beyond the narrow claims of Anti-Social Personality Disorder (APD) discussed in petitioner's brief. Pet. Br. 24-25. According to petitioner, APD is merely a description of conduct, and hence is not mitigating. By contrast, the type of genetic, biological and other evidence cited by the Ninth Circuit as mitigating went far beyond merely describing respondent's conduct, and was in fact an assessment of his culpability, because it referenced factors beyond respondent's control. See Pet. App. A19.

J.A. 160 (declaration of Thomas C. Thompson). While respondent may have been legally guilty of murder, this is substantial evidence that he may not have been so morally culpable as to deserve the death penalty.

Petitioner claims (Br. 24) that respondent's evidence "is only marginally – if at all – mitigating," and in fact "simply confirms that Landrigan is a violent sociopath." That is not true. Nine of the eleven judges on the Ninth Circuit en banc panel found that these factors were "the very sort of mitigating evidence that 'might well have influenced the [judge's] appraisal of [respondent's] moral culpability'" (Pet. App. A19) and that respondent therefore deserved an evidentiary hearing to substantiate his claims. This lopsided majority included one judge who had actually ruled against respondent's ineffective assistance claim in the initial panel decision. The fact that so many judges agreed on the issue of prejudice is powerful evidence that the mitigating factors deserve further exploration in an evidentiary hearing.

The Ninth Circuit's determination of prejudice is supported by empirical research examining how sentencing decisions typically are affected by mitigation evidence similar to that available here. *Strickland* requires a court to hypothesize how sentencing decision makers would respond to various types of mitigation evidence. It therefore makes sense to take account of such research, which provides evidence of how Americans actually balance their general support for capital punishment with their desire to do justice in light of individual circumstances.

In recent years, a series of studies have examined the attitudes of real-life capital jurors, mock capital jurors, and ordinary American citizens concerning the death penalty. A special focus of this research has been assessing how support for capital punishment changes in the presence of specific types of mitigation evidence. While none of the studies tested the precise set of mitigating circumstances at issue here, the studies clearly establish that similar types of evi-

dence lead large numbers of capital-punishment supporters to oppose imposition of death sentences in specific cases. Even though a judge rather than a jury imposed the respondent's sentence, these studies provide instructive information about the test under *Strickland* – how a reasonable fact-finder would weigh particular types of mitigation evidence

One study of 153 actual capital jurors pulled from 41 different cases presented the participants with a series of potential mitigating circumstances and asked whether each circumstance would have made them "much more," "slightly more," "just as," "slightly less," or "much less" likely to vote to impose the death penalty.[36] Overall, 27% of jurors would have been "much less" likely to hand down a death sentence to a defendant with a history of mental illness;[37] 25% would have been "much less" likely to execute a defendant suffering from extreme mental and emotional disturbance;[38] 20% would have been "much less" likely to impose death on a defendant who had spent time in institutions "but was never given any real help;"[39] and 10% would have been "much less" likely to impose death on a defendant who had suffered serious abuse as a child.[40] If the "much less" and "slightly less" categories of response are aggregated, 56%, 55%, 48%,

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[36] Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1540-41 & 1551 (1998). For an explanation of the Capital Jury Project and an explanation of the relevance of these studies for judicial determinations, see William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L. J. 1043, 1059-62 (1994-1995).

[37] Garvey, *supra* note 36, at 1559.

[38] *Id.* at 1555.

[39] *Id.* at 1559.

[40] *Id.* at 1559.

and 37% of jurors would have been less likely to impose a death sentence under each circumstance, respectively.[41]

These findings are confirmed by a 2004 study of 260 "mock jurors" conducted by researchers at the University of Alabama.[42] Each juror was presented with paragraph-long vignettes describing different murder scenarios and providing short background information on the killer; they then were asked to sentence each defendant either to death or to life imprisonment. In the three "control" vignettes, in which no mitigating circumstances were present, the mock jurors voted in favor of death by the overwhelming margins of 87%, 82%, and 77%, respectively.[43] Support for the death penalty plummeted, however, when the vignettes included mitigation evidence suggesting that the defendant, while guilty of the crime, nonetheless was not fully culpable. For example, only 7% of jurors imposed death when the defendant was suffering from schizophrenia; only 29% did so when the defendant was "borderline retarded"; and only 45% favored death when the defendant had suffered severe verbal and physical abuse by his parents.[44]

Finally, the significant impact of mitigation evidence similar to the types of evidence at issue here has also been documented in public opinion surveys. According to a Gallup Poll conducted in May 2002, 72% of Americans sup-

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[41] *Id.* at 1555, 1559.

[42] Michelle E. Barnett, Stanley L. Brodsky, & Cali Manning Davis, *When Mitigation Evidence Makes a Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials*, 22 Behav. Sci. & Law 751 (2004); see generally Mark Costanzo & Sally Costanzo, *Jury Decision Making in the Capital Penalty Phase: Legal Assumptions, Empirical Findings, and a Research Agenda*, 16 Law and Hum. Behav. 185, 190 (1992).

[43] Barnett et al., *supra* note 42, at 761.

[44] *Ibid.*

port the death penalty in general.[45] Only 19%, however, support executing murderers who are mentally ill – and only 13% support executing the mentally retarded.[46] A similar poll from June 1997 found that 80% of Americans overall support the death penalty, with only 16% in opposition.[47] For defendants severely abused in their childhood, however, that opposition rose to 41%.[48] Likewise, a poll from November 1995 found 78% for capital punishment overall[49] – but only 48% for defendants abused as children,[50] and only 9% for those who were mentally retarded.[51]

These studies demonstrate that when, as here, there is evidence that the defendant's criminal behavior is shaped by factors outside his control, support for imposition of the death penalty drops precipitously. That is true even among individuals who generally support capital punishment.

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[45] Gallup Organization, *Question Number: 009*, Public Opinion Online (May 21, 2002), *available at* I exis ACC-NO: 0404089.

[46] Gallup Organization, *Question Number: 013*, Public Opinion Online (May 21, 2002), *available at* Lexis ACC-NO: 0404093; Gallup Organization, *Question Number: 014*, Public Opinion Online (May 21, 2002), *available at* Lexis ACC-NO: 0404094.

[47] Princeton Survey Research Associates, *Question Number: 003*, Public Opinion Online (June 7, 1997), *available at* Lexis ACC-NO: 0280513.

[48] Princeton Survey Research Associates, *Question Number: 005*, Public Opinion Online (June 7, 1997), *available at* Lexis ACC-NO: 0280515.

[49] Princeton Survey Research Associates, *Question Number: 007*, Public Opinion Online (November 1995), *available at* Lexis ACC-NO: 0247880.

[50] Princeton Survey Research Associates, *Question Number: 009*, Public Opinion Online (November 1995), *available at* Lexis ACC-NO: 0247882.

[51] Princeton Survey Research Associates, *Question Number: 016*, Public Opinion Online (November 1995), *available at* Lexis ACC-NO: 0247889.

These findings support the conclusion of the nine judges below that there is a "reasonable probability" that the sentencing determination in this case would have been different if this information had been available. Certainly there can be no question that respondent has adduced sufficient evidence to require an evidentiary hearing on that question.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 2006